

112  
No. 2451

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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ALAMO CATTLE COMPANY, Sociedad Anonima,  
a Corporation,

Plaintiff in Error,

vs.

JOHN G. HALL,

Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the District of Arizona.

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Filed

AUG 13 1914

F. D. Monckton,  
Clerk.

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United States  
Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**[Names and Addresses of Attorneys of Record.]**

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GEORGE J. STONEMAN, REESE M. LING,  
Phoenix, Arizona,  
Attorneys for Plaintiff,

WILLIAM M. SEABURY, Phoenix, Arizona,  
FRANK J. BARRY, Nogales, Arizona,  
Attorneys for Defendant.

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*In the District Court of the United States of  
America, in and for the District of Arizona.*

No. 112—LAW.

JAMES G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO., Sociedad Anonima,  
Defendant.

**Complaint.**

Comes now James G. Hall, by Messrs. Charles R. Loomis, Fred C. Knollenberg, George J. Stoneman and Reese M. Ling, his attorneys, and complaining of The Alamo Cattle Co., Sociedad Anonima, defendants above named, respectfully alleges and shows unto this Honorable Court:

I.

That at all times hereinafter mentioned, plaintiff was and now is a citizen of Colorado; that at all times hereinafter mentioned, defendant The Alamo Cattle Co., Sociedad Anonima, was and now is a



2      *Alamo Cattle Company, Sociedad Anonima,*  
corporation, created, organized and existing under  
and by virtue of the laws of the Republic of Mexico.

## II.

That said defendant corporation on the 16th day of January, A. D. 1913, and for a long time prior thereto, had been and now is engaged in the business of raising and buying cattle at Magdalena, State of Sonora, Republic of Mexico, and in contracting for the sale of said cattle and selling said cattle at Nogales, Naco and Douglas, all being points within the State of Arizona; and [1\*] plaintiff further alleges that on the 16th day of January, A. D. 1913, and for a long time prior thereto, said defendant corporation had been and now is represented in the conduct and transaction of its business in which it was so engaged in the selling and delivery of cattle in the State of Arizona, by one W. Beckford Kibbey, Jr., its President and one Elias, whose Christian name is to this plaintiff unknown and at the time of the filing of this complaint cannot be ascertained by him; the said Elias (as plaintiff is informed and believes and upon such information and belief alleges) is the Secretary of said defendant corporation.

## III.

Plaintiff avers and alleges that the cause of action hereinafter in this complaint set forth is a cause of action where the matter in controversy exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs, and is a suit between James G. Hall, plaintiff above named, a citizen of the

\*Page number appearing at foot of page of original certified Record.

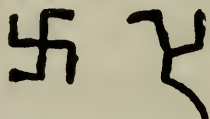


State of Colorado and The Alamo Cattle Co., Sociedad Anonima, an alien corporation and citizen of the Republic of Mexico, engaged in and doing business in the State of Arizona, and E. W. Myers, hereinafter in this complaint mentioned was on the 16th day of January, A. D. 1913, and on the 4th day of February, A. D. 1913, a citizen of the State of Texas; and plaintiff further avers and alleges that on the said 16th day of January, A. D. 1913, and 4th day of February, A. D. 1913, the said E. W. Myers, hereinafter in this complaint named as the assignor of a certain contract hereinafter mentioned, might have prosecuted in his own name in this court, this cause of action upon said contract to recover thereon, if no assignment thereof has been made to plaintiff.

#### IV.

Plaintiff further avers and alleges that on the 16th [2] day of January, A. D. 1913, The Alamo Cattle Co., Sociedad Anonima, defendant above named, at the town of Nogales, State of Arizona, entered into a certain written contract and agreement with one E. W. Myers, of the city of El Paso, State of Texas, under and by the terms of which the said The Alamo Cattle Co., Sociedad Anonima, agreed to deliver to the said E. W. Myers not less than four thousand (4,000) nor more than five thousand (5,000) head of two year old steers, and one thousand (1,000) head of four year old steers; said cattle to be by said defendant delivered f. o. b. on cars at Nogales in the State of Arizona, all duties and expenses thereon to be paid by defendant. That under the terms of said contract it was stipulated and agreed that all of said

cattle were to be delivered in train-load lots during the months of April and May, A. D. 1913, all thereof

to be branded as follows:  That the

said E. W. Myers should furnish cars, and that all of said cattle should be of a grade as good or better than a grade of cattle running in the Republic of Mexico, known as the "Terrasas Cattle," and that defendant should permit the said E. W. Myers the privilege of cutting out and rejecting fifteen (15%) per cent of all of said cattle after all runts, stags (unless otherwise specified), cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship, or unmerchantable cattle had been cut out by said defendant.

It was further specified, understood and agreed in said contract that upon the delivery by defendant to the said E. W. Myers of said cattle, of the grade, brand, kind and quality, and under the conditions and in the numbers hereinabove mentioned during the months of April and May, A. D. 1913, the said E. W. Myers should, subject to the conditions and reservations hereinafter set forth, pay to the said defendant, through its agents, W. Beckford Kibbey, Jr., and Elias, or either of them, the sum of Twenty-three (\$23.00) Dollars per head, United States currency, for all two year old steers and the sum of Twenty-eight (\$28.00) Dollars per head, United States currency, for all four year old steers; that under the further terms of said contract the defendant acknowledged receipt [3] from the said E. W. Myers of the sum of Ten Thousand (\$10,000.00) Dollars, which sum, under the terms of said contract,



should be and was understood and agreed to be a partial payment on the total price to be paid for said cattle, and further said Myers agreed to pay the balance of the purchase money to be paid for said cattle so to be delivered, when said cattle of the grade and under the terms, conditions and descriptions hereinabove mentioned should be delivered on board of the cars, failing so to do, the said E. W. Myers should forfeit the sum of Ten Thousand (\$10,000.00) Dollars and any further amount or amounts advanced under the terms of said contract.

And plaintiff further alleges that it was further stipulated, understood and agreed by the terms of said contract that in the event defendant should fail to deliver the cattle so by it agreed to be delivered of the grade, brand and description and in the numbers, and at the times mentioned in said contract, then and in that event defendant should pay to the said E. W. Myers the sum of Two (\$2.00) Dollars per head for all of said cattle which it should fail so to deliver, and in addition thereto, should return the sum of Ten Thousand (\$10,000.00) Dollars, and any further sum or sums of money paid and advanced by the said E. W. Myers as a forfeit and in liquidated damages to be paid to the said E. W. Myers for the failure on the part of defendant to perform the conditions of said contract, a copy of which contract is hereto attached and marked Exhibit "A" and made a part of this complaint.

Plaintiff alleges that said contract was executed between the parties thereto on the 16th day of January, A. D. 1913, and that on said date the said E. W.

Myers then and there paid to W. Beckford Kibbey, Jr., then and there the president and authorized agent of defendant corporation, the sum of Ten Thousand (\$10,000.00) Dollars so in said contract provided to be by him paid.

## V.

Plaintiff alleges that said contract was and is an [4] assignable chose in action and that on the 4th day of February, A. D. 1913, for a good and valuable consideration theretofore paid by plaintiff to the said E. W. Myers, the said E. W. Myers sold, assigned, transferred and set over unto plaintiff said contract hereinabove referred to as Exhibit "A," and all the rights and interests therein held by the said E. W. Myers, including any and all claims for damages and rights of actions against plaintiff, arising under the terms of said contract, and that plaintiff on the 4th day of February, 1913, and ever since said date has been and now is the owner and holder by assignment as aforesaid of all rights, claims and causes of action which have accrued or might have accrued to the said E. W. Myers as against defendant under the terms of said contract.

## VI.

Plaintiff alleges that at all times during the months of April and May, A. D. 1913, he was ready, willing and able to comply with and did comply with, the terms and conditions of said contract to be by him performed thereunder, and that at all times during said months up to the 13th day of May, A. D. 1913, upon which said date plaintiff was notified by defendant that it would not perform the terms of



said contract on its part to be performed, plaintiff was at the town of Nogales in the State of Arizona, ready, willing and able to receive said cattle from defendant in the numbers and of the grade, brand, kind and character mentioned in said contract, but that defendant notwithstanding failed, neglected and refused to deliver to plaintiff said cattle in the numbers, and of the grade, brand, kind and character required by it to be delivered under the terms of said contract, and on the 13th day of May, A. D. 1913, notified plaintiff in writing that it would not make any delivery to him of cattle other than the cattle of the kind, brand, character and numbers theretofore tendered by defendant to plaintiff; which [5] said cattle so by defendant tendered to plaintiff for delivery plaintiff alleges were not of the kind, brand, character, or quality, or grade, or numbers required by it to be delivered in this, to wit: That said cattle so tendered for delivery were not cattle tendered in train-load lots as good or better than the "Terrasas cattle," or of the grade, kind, character, brand or numbers required under the terms of said contract to be by defendant delivered in train-load lots at Nogales, in the State of Arizona.

## VII.

Plaintiff alleges that upon the failure on the part of defendant to comply with the terms of said contract and to perform the conditions thereof required thereunder by it to be performed, and prior to the commencement of this action, he demanded from defendants the return to him of the sum of Ten Thousand (\$10,000.00) Dollars heretofore by defend-

ant received from the said E. W. Myers as a part payment on the purchase price of said cattle and also demanded from defendant the sum of Two (\$2.00) Dollars per head on four thousand (4,000) head of two year old steers and one thousand (1,000) head of four year old steers, making a total of the further sum of Ten Thousand (\$10,000.00) Dollars, which sums of money, in the aggregate of Twenty Thousand (\$20,000.00) Dollars, plaintiff alleges became due and now is due from defendant to plaintiff under the terms of said contract on account of the failure and refusal of defendant to perform the conditions thereof, as hereinabove set forth, but that defendant refused and still does refuse to pay to plaintiff said sum of Twenty Thousand (\$20,000.00) Dollars or any part thereof; whereby plaintiff was and is damaged in the sum of Twenty Thousand (\$20,000.00) Dollars, and plaintiff alleges that on account of the failure, refusal and neglect on the part of defendant to perform [6] the conditions of said contract, he has been and now is damaged in the sum of Twenty Thousand (\$20,000.00) Dollars.

#### VIII.

Plaintiff alleges that defendant corporation is a foreign corporation engaged in business in the State of Arizona and that said defendant has failed, neglected and refused to appoint a statutory agent upon whom service of writs and process may be had as required by the laws of the State of Arizona.

WHEREFORE, plaintiff prays judgment against defendant for the sum of Twenty Thousand (\$20,000.00) Dollars, together with interest thereon

from February 13th, A. D. 1913, and costs of this suit.

(Signed) CHAS. R. LOOMIS,  
FRED C. KNOLLENBERG,  
GEORGE J. STONEMAN,  
REESE M. LING,

Attorneys for Plaintiff. [7]

**Exhibit "A" [to Complaint—Contract for Sale and Purchase of Cattle, Dated January 16, 1913, Alamo Cattle Co., etc., and E. W. Myers].**

**CONTRACT FOR SALE AND PURCHASE OF CATTLE.**

This agreement made and entered into this 16th day of January, 1913, between THE ALAMO CATTLE CO., S. A., of Magdalena, Sonora, Mexico, hereinafter known as the seller, and Mr. E. W. Myers of El Paso, Texas, hereinafter known as the buyer, witnesseth as follows:

For and in consideration of the sum of:

(Twenty Three) Dollars U. S. Cy. for two year old steers,

(Twenty eight) Dollars U. S. Cy. for four year old steers

——— Dollars U. S. Cy. for ———

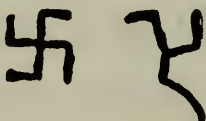
——— Dollars U. S. Cy. for ———

the seller agrees to sell and deliver F. O. B. cars at Nogales, Ariz., station, all duties and expenses paid; buyer to furnish cars four thousand to five thousand head of two year old steers and one thousand head of four year old steers as good or better than the Terrasas cattle. Payment of these cattle is to be guaranteed in a manner satisfactory to the First



10     *Alamo Cattle Company, Sociedad Anonima,*  
National Bank of Nogales, Ariz., before each ship-  
ment crosses the line all to be of full ages at time of  
delivery.

The seller also agrees to allow the buyer the privi-  
lege of cutting out and rejecting fifteen per cent of  
said cattle after all runts, stags (unless otherwise  
specified), cripples, lump-jaws, sway-backs, blinds,  
cattle too thin to ship or unmerchantable cattle have  
been cut out by the seller.

Cattle to be branded  .

The seller hereby acknowledges receipt of (Ten  
Thousand) Dollars U. S. Cy. in hand paid this day  
by the buyer, who agrees to pay the balance of the  
purchase money when said cattle are delivered on  
board cars, and failing to do so he shall forfeit the  
amount or amounts advanced on this contract. The  
seller [8] agrees to pay two dollars, in addition  
returning the forfeit, on each head he fails to deliver  
under this contract which shall constitute entire  
claim for damages. Cattle to be cut Moraga or  
Destiladera, buyer to give fifteen day's notice for  
each delivery in train-load lots during April and  
May, 1913.

Witness our hands this 16th day of January, 1913.

ED. W. MYERS,

ALAMO CATTLE CO.,

W. BECKFORD KIBBEY, Jr., Prest. [9]



**[Exhibit "A" to Complaint—Contract for Purchase and Sale of Cattle, Dated January 16, 1913, Ed. W. Myers and J. G. Hall and K. D. Oliver.]**

**CONTRACT FOR THE PURCHASE AND SALE  
OF CATTLE.**

WHEREAS, on or about the 16th day of January, 1913, Ed. W. Myers, of El Paso, Texas, did enter into a contract to purchase four to five thousand (4,000 to 5,000) head of two year old steers, and one thousand (1,000) head of four year old steers as good or better than the Terrasas cattle, from The Alamo Cattle Company, S. A., of Magdalena, Sonora, Mexico; which cattle are to be delivered at Nogales, Arizona, all duties and expenses paid; a copy of which original contract is hereto attached and made a part hereof, and marked Exhibit "A," to which reference is hereby made for a more complete description, terms, and conditions and:

WHEREAS, the said Ed. W. Myers is desirous of selling said contract to J. G. Hall, and J. G. Hall is desirous of purchasing said contract and cattle from and through the said Ed. W. Myers.

NOW THEREFORE WITNESSETH that for and in consideration of the sum of Ten Thousand (\$10,000.00) Dollars advance money which has previously been paid by the said Ed. W. Myers to the said Alamo Cattle Company, the receipt of which is hereby confessed and acknowledged, and further and additional sum of Three Dollars (\$3.00) per head on the two year old steers delivered under said

contract; and Four Dollars (\$4.00) per head on the four year old steers delivered under said contract, the said Ed. W. Myers does hereby sell and assign the aforesaid contract and all rights thereunder to the said J. G. Hall, his successors and assigns.

It is mutually understood and agreed by and between the said Ed. W. Myers and the said J. G. Hall, acting by and through his duly authorized agent and representative K. D. Oliver, that the said Ed. W. Myers is to receive the aforesaid additional consideration of Three Dollars (\$3.00) per head for the two year old [10] steers, and Four Dollars (\$4.00) per head for the four year old steers only in case they are delivered, and in the event there are more than four thousand (4,000) head of two year old steers and more than one thousand (1,000) head of four year old steers, the said J. G. Hall is to pay no additional consideration to the said Ed. W. Myers for such additional number of cattle which may be delivered under the said contract.

It is understood and agreed that J. G. Hall is to pay Ed. W. Myers his bonus on the cattle mentioned in this contract at the time of each and every delivery.

It is also mutually understood and agreed that the said Ed. W. Myers or E. M. Tankersly, his agent, shall be on the ground at the time of delivery of all cattle and aid and assist the said J. G. Hall, his agents or assigns, in receiving said cattle.

IN WITNESS WHEREOF the said Ed. W. Myers, acting in his own proper person, and the said J. G. Hall, acting by and through his duly author-

ized agent and representative, K. D. Oliver, have hereunto set their hands and seals to duplicate originals, this 4th day of February, A. D. 1913.

ED. W. MYERS.

J. G. HALL.

By K. D. OLIVER, (Seal)  
Manager.

[Endorsements]: No. 10 (Tucson). #112-Law.  
In the District Court of the United States of America, in and for the District of Ariz. James G. Hall, Plaintiff, vs. The Alamo Cattle Co., S. A., Defendant. Complaint. Filed Jan. 19, 1914, at 4:55 P. M. Geo. W. Lewis, Clerk. By Robert E. L. Webb, Deputy. [11]

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**Summons.**

*In the United States District Court for the District  
of Arizona.*

No. 112.

JAMES G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO., Sociedad Anonima,  
Defendant.

Action Brought in the United States District Court  
for the District of Arizona.

The President of the United States of America,  
Greeting: To The Alamo Cattle Co., Sociedad  
Anonima.

YOU ARE HEREBY SUMMONED AND RE-  
QUIRED to appear in an action brought against you



14     *Alamo Cattle Company, Sociedad Anonima,*  
by the above-named plaintiff in the United States  
District Court for the District of Arizona, and an-  
swer the complaint filed therein with the Clerk of  
this said Court, at Phoenix, in said District, within  
twenty days after service upon you of this Sum-  
mons, if served in this said District, or in all other  
cases within thirty days thereafter, the times above  
mentioned being exclusive of the day of service, or  
judgment by default may be taken against you.

Given under my hand and seal of the United  
States District Court for the District of Arizona, this  
19th day of January, 1914.

[Seal]

GEORGE W. LEWIS,  
Clerk of Said District Court.

#### UNITED STATES MARSHAL'S RETURN.

Received this writ Jan. 20, 1914, at Phoenix, Ari-  
zona, and executed the same Feb. 27, 1914, at No-  
gales, Arizona, by delivering a true and certified  
copy hereof, to which was attached a copy of the bill  
of complaint, to Ramon Elias, personally, the said  
Ramon Elias at the time being Vice-president of the  
Alamo Cattle Company.

J. P. DILLON,  
U. S. Marshal.  
By A. W. Forbes,  
Deputy.

[Endorsements]: No. 10 (Tucson). Marshal's  
Docket No. 379. Filed Mar. 1, 1914. Geo. W.  
Lewis, Clerk. By R. E. L. Webb, Deputy. [12]

*In the United States District Court for the District  
of Arizona.*

No. 112-LAW.

JAMES G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

**Amended Answer.**

Comes now the defendant above named and answering the plaintiff's complaint herein, demurs to said complaint upon the ground that the said complaint fails to state facts sufficient to constitute a cause of action.

I.

Further answering the said complaint defendant admits the allegations contained in Paragraph I of said complaint except that it denies any knowledge or information sufficient to form a belief as to whether or not plaintiff was or now is a citizen of the State of Colorado.

II.

Defendant admits the allegations in Paragraph II of said complaint.

III.

Defendant admits the allegations contained in Paragraph III of said complaint except that it denies that it has any knowledge sufficient to form a belief as to whether or not E. W. Myers mentioned in said complaint was on January 16, 1913, and on

February 4, 1913, or at any other time, a citizen of the State of Texas, and denies that it has any knowledge or information sufficient to form a belief as to whether or not the said Myers at the times stated, as the assignor [13] of the certain contract mentioned in said complaint, might or could have prosecuted in his own name in this court the alleged cause of action purported to be set up in said complaint if no alleged assignment thereof had been made to the plaintiff.

#### IV.

Defendant denies each and every allegation contained in Paragraph IV of said complaint except that defendant admits that it made and executed the certain contract, copy of which is attached to said complaint and marked Exhibit "A," on or about January 16, 1913, between the said defendant and E. W. Myers, and defendant further admits that at or about the time of the execution of said contract, namely, January 16, 1913, the defendant then and there received from the said E. W. Myers the sum of ten thousand (\$10,000.00) Dollars required to be paid to the defendant by the said contract, copy of which is attached to the said complaint herein.

#### V.

Defendant admits the allegations contained in Paragraph V of said complaint.

#### VI.

Defendant denies each and every allegation contained in Paragraph VI of said complaint.

#### VII.

Defendant denies each and every allegation con-



tained in Paragraph VII of said complaint except that defendant admits that it refuses to pay to the plaintiff the sum of Twenty Thousand (\$20,000.00) Dollars, or any part thereof.

VIII.

Defendant admits the allegations contained in Paragraph VIII thereof, but alleges in connection therewith that since the commencement of this action it has been duly authorized to conduct and transact business in the State of [14] Arizona and has duly complied with all of the laws relating to the lawful transaction of business in the State of Arizona by a corporation organized and existing under and pursuant to the laws of the Republic of Mexico, and that since the commencement of this action defendant has had and now maintains an office for the regular transaction of its business at the town of Nogales, in the County of Santa Cruz, and State of Arizona, and has duly appointed a statutory agent qualified to receive the service of process in its behalf.

For a separate defense defendant alleges:

IX.

At all times hereinafter mentioned the defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the Republic of Mexico, and that heretofore the said defendant was and now is duly authorized to transact business in the State of Arizona under and pursuant to its laws, and that it has a place for the regular transaction of its said business in the Town of Nogales, in the State of Arizona. And that it has in all re-

spect complied with the laws of the State of Arizona, relating to the lawful transaction of business within the State of Arizona by foreign corporations.

X.

That heretofore on or about January 16, 1913, the defendant made and entered into a contract in writing with one E. W. Myers, which said contract was and is in words and figures following:

“This agreement made and entered into this 16th day of January, 1913, between THE ALAMO CATTLE CO., S. A., of Magdalena, Sonora, Mexico, hereinafter known as the seller and Mr. E. W. Myers of El Paso, Texas, hereinafter known as [15] the buyer, witnesseth as follows:

For and in consideration of the sum of:

(Twenty Three) Dollars U. S. Cy. for two year old steers;

(Twenty Eight) Dollars U. S. Cy. for four year old steers.

..... Dollars U. S. Cy. for .....

..... Dollars U. S. Cy. for .....

the seller agrees to sell and deliver F.O.B. cars at Nogales, Arizona, station, all duties and expenses paid; buyer to furnish cars four thousand to five thousand head of two year old steers and one thousand head of four year old steers as good or better than the Terrasas cattle. Payment of these cattle is to be guaranteed in a manner satisfactory to the First National Bank of Nogales, Ariz., before each shipment crosses the line, all to be of full ages at time of delivery.

The seller also agrees to allow the buyer the privi-



lege of cutting out and rejecting fifteen per cent of said cattle after all runts, stags (unless otherwise specified), cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship or unmerchantable cattle have been cut out by the seller.

Cattle to be branded . . . . .

The seller hereby acknowledges receipt of (Ten Thousand) Dollars, U. S. Cy., in hand paid this day by the buyer, who agrees to pay the balance of the purchase money when said cattle are delivered on board cars, and failing to do so he shall forfeit the amount or amounts advanced in this contract. The seller agrees to pay two dollars, in addition returning the forfeit on each head he fails to deliver under this contract, which shall constitute entire claim for damages. Cattle to be cut Moraga or Destiladera, buyer to give fifteen days' notice for each delivery in train-load lots during April and May, 1913. [16]

Witness our hands this 16th day of January, 1913.

ED. W. MYERS.

ALAMO CATTLE CO.

W. BECKFORD KIBBEY, Jr., Prest."

XI.

On information and belief, defendant alleges that on or about February 4, 1913, the contract between defendant and the said E. W. Myers, dated January 16, 1913, was, for a valid consideration, by the said E. W. Myers duly assigned, transferred and set over unto J. G. Hall, the plaintiff above named, and that thereafter and thereupon the said J. G. Hall assumed and agreed to perform each and all of the terms and conditions of said contract required to be

20     *Alamo Cattle Company, Sociedad Anonima,*  
performed by the said E. W. Myers.

XII.

That at all times during the months of April and May, 1913, as required by the terms of said contract between defendant and the said E. W. Myers, dated January 16, 1913, defendant was ready, willing and able to comply with the terms and conditions of said contract to be by it performed, and did duly and fully comply with and perform said terms and conditions on its part until the plaintiff refused and failed to perform the terms and conditions of said contract on his part to be performed, as hereinafter more fully set forth.

XIII.

That in the early part of April, 1913, defendant duly tendered to the plaintiff above named and his duly authorized representative one thousand head of cattle of the kind and quality which defendant agreed to furnish by said contract, but notwithstanding plaintiff refused to accept said cattle so tendered at said time; that on or about May 9, 1913, defendant duly tendered to the plaintiff above named and his [17] duly authorized representatives from one thousand *twelve* hundred to one thousand five hundred head of cattle of the kind and quality which defendant agreed to furnish and sell under and pursuant to the terms of the said contract, and that on or about May 13, 1913, defendant also duly tendered to the plaintiff above named and his duly authorized representatives one thousand and ninety-three head of cattle of the kind and quality which defendant agreed to furnish and sell under

and pursuant to the terms of said contract, but plaintiff, without any right or authority so to do, broke and failed to perform his part of the said contract and refused to select and accept any of the said cattle so offered and tendered by defendant to the said plaintiff, although the said cattle in every respect fulfilled each and all of the terms and conditions of the said contract relating thereto, and that plaintiff further failed to perform said contract in that the said plaintiff had not then and there or thereafter supplied the cars necessary to receive the said cattle at Nogales, Arizona, in accordance with the terms of said contract. And defendant further alleges that plaintiff further failed to perform the said contract in that plaintiff had made no arrangement satisfactory to the First National Bank of Arizona, for the payment of the purchase price of the said cattle in accordance with the terms of the said contract, and that plaintiff has wholly failed and neglected to pay the contract price for said cattle, although payment thereof has been duly demanded, and has wholly failed and neglected to perform the terms and conditions of said contract to be by him performed.

#### XIV.

Defendant further alleges that at the time defendant entered into said contract with the said Myers, the subject of said contract, namely, the cattle therein specified, and the business connected therewith, was of a speculative character [18] and that the value and price of the cattle therein described and agreed to be furnished by the defend-



ant to the said Myers was and still is of a fluctuating character. That the amount of damage which defendant might and could sustain by reason of a breach of said contract on the part of the said plaintiff and of a failure upon his part to perform the terms thereof was uncertain in amount, and not readily ascertainable or ascertainable at all, and that the said sum of ten thousand (\$10,000.00) Dollars mentioned in said contract was and is a reasonable and usual sum to be fixed upon and paid to the defendant as liquidated damages and not as a penalty or forfeiture for the breach of the said contract upon the part of the said plaintiff.

For a counterclaim against said plaintiff as follows:

#### XV.

Defendant realleges each and all of the allegations of Paragraphs IX, X, XI, XII and XIII, of the answer herein as if here set forth at length.

#### XVI.

Defendant further alleges that for the purpose of performing the terms and conditions of said contract to be by it performed, defendant purchased and gathered five thousand heads of cattle of the kind and quality referred to in said contract and was obliged to hold them for delivery to plaintiff under said contract during the months of April and May, 1913, at great expense by reason of the failure of the plaintiff to accept said cattle when tendered as aforesaid; that the cost reasonably and necessarily incurred by the defendant in gathering, driving and holding said cattle as aforesaid was One (\$1.00) Dollar per head,

making the aggregate amount of loss so incurred by defendant Five Thousand (\$5,000.00) Dollars; [19] that during said time, defendant without negligence on its part or on the part of its agents and servants and by reason of defendant being compelled, by plaintiff's failure to accept said cattle when tendered, to drive and hold said cattle for an excessively long period, as aforesaid, lost by death at least two hundred head of said cattle; that the market value of said cattle which so died without export duties and charges thereon was Eighteen (\$18.00) Dollars per head; that the defendant was unable to sell or reap any benefit out of said dead cattle, making the aggregate loss so incurred by defendant three thousand six hundred (\$3,600.00) Dollars; that defendant, though it diligently endeavored to sell said cattle after May 13, 1913, to other parties in order to mitigate the damages herein, was unable to sell two thousand of said head of cattle during said shipping season, which expired on June 20, 1913, when it became too hot to ship cattle, and defendant was obliged to hold said two thousand head of cattle until November, 1913, when it was possible to resume shipping cattle, and the defendant then sold said cattle to parties other than plaintiff at an increase in price of One (\$1.00) Dollar per head over the price stipulated in said contract; that the cost reasonably and necessarily incurred by the defendant in keeping said cattle from May 13, 1913, to November, 1913, was four (\$4.00) Dollars per head; that deducting one (\$1.00) Dollar per head, representing the increase in price obtained by defendant as aforesaid, the aggre-

gate loss thus incurred by defendant was Six Thousand (\$6,000.00) Dollars; that during said time defendant lost by death at least one hundred and fifty head of said cattle without negligence on its part or on the part of its agents and servants; that the market value of said cattle which died without export duties and charges thereon was Eighteen (\$18.00) Dollars per head; that defendant was unable to sell or reap any benefit from said dead cattle, making the aggregate loss so incurred by defendant Two Thousand Seven Hundred (\$2,700.00) Dollars; whereby defendant was and is damaged in the total aggregate [20] sum of Seventeen Thousand Three Hundred (\$17,300.00) Dollars, and defendant alleges that on account of the failure, refusal and neglect on the part of plaintiff to perform the conditions of said contract he has been and now is damaged in the sum of Seventeen Thousand Three Hundred (\$17,300.00) Dollars, and that defendant has received payment of no part thereof, except the sum of Ten Thousand (\$10,000.00) Dollars heretofore received as aforesaid.

WHEREFORE, defendant demands judgment upon its said demurrer and that plaintiff take nothing from the defendant herein, and that the complaint herein be dismissed with costs, and that defendant obtain judgment against plaintiff on its counterclaim for the sum of Seven Thousand Three Hundred (\$7,300.00) Dollars, together with interest



thereon from December 1, 1913, and costs.

FRANK J. BARRY,

Nogales, Arizona,

WILLIAM M. SEABURY,

Phoenix, Arizona,

Attorneys for Defendant.

[Endorsements]: No. 10 (Tucson). In the United States District Court for the District of Arizona. James G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defendant. Amended Answer. Served with a copy of the within this 22d day of April. George J. Stoneman, Reese M. Ling. Filed April 23, A. D. 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [21]

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*In the United States District Court for the District  
of Arizona.*

No. 112—LAW.

JAMES G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

**Answer to Cross-Complaint.**

Comes now James G. Hall and answering the counterclaim and cross-complaint filed by defendant herein and denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and has no means of ascertaining the truth thereof, and for this reason denies the allegations in said cross-complaint

contained, and denies that through any of the acts of plaintiff or through the failure on the part of plaintiff to do or perform any of the acts or things as charged in said counterclaim and cross-complaint, defendant has been damaged in the sum of Seventeen Thousand Three Hundred (\$17,300.00) Dollars or any other sum whatsoever, or at all, and denies that plaintiff is indebted to defendant on account of any of the matters or things in said counterclaim and cross-complaint set forth, in the sum of Seven Thousand Three Hundred (\$7,300.00) Dollars or any other sum or at all. [22]

WHEREFORE, plaintiff having answered herein, prays that said counterclaim and cross-complaint be dismissed and the defendant take nothing thereunder.

GEORGE J. STONEMAN,  
REESE M. LING,  
FRED C. KNOLLENBERG,  
CHARLES R. LOOMIS,

Attorneys for Plaintiff.

[Endorsements]: No. 10 (Tucson). In the United States District Court for the District of Arizona. James G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defendant. Answer to Cross-Complaint. Served with a copy of the within this 1st day of May, 1914. Frank J. Barry, W. M. Seabury, Attorneys for Defendant, by DeRiemer. Filed May 2, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [23]



**[Minutes of Court—May 20, 1914—Order Changing  
Name of Plaintiff.]**

*In the District Court of the United States for the  
District of Arizona.*

Minute Entry of Wednesday, May 20th, 1914.

No. 10 (TUCSON).

JAMES G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

Upon motion of George J. Stoneman, Esquire,  
counsel for the plaintiff herein, it is ordered that the  
name of the plaintiff be changed from James G. Hall  
to John G. Hall. [24]

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**[Minutes of Court—May 22, 1914.]**

*In the District Court of the United States for the  
District of Arizona.*

Minute Entry of Friday, May 22d, 1914.

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

This cause coming on this day regularly for trial,  
the plaintiff being present in person and with his

28     *Alamo Cattle Company, Sociedad Anonima,*  
counsel, F. C. Knollenberg, Esquire, Charles R. Loomis, Esquire, George J. Stoneman, Esquire, and Reese M. Ling, Esquire, and the defendant being represented by its counsel, Wm. M. Seabury, Esquire, and Frank J. Barry, Esquire, and both parties announce ready for trial. Whereupon the Clerk was ordered to draw eighteen names from the box wherein he had deposited in the presence of the Court the names of the jurors summoned and not excused, and the names of eighteen persons were thereupon drawn, and all answering thereto respectively, took their places in the jury-box. The said jurors were then sworn and examined on their *voir dire*. Guy Brooks was challenged by the plaintiff for cause, and excused by the Court, and thereupon C. S. McHenry was called, sworn and examined on his *voir dire*. The panel being now full and complete and said jurors in the jury-box having been passed for cause by both the prosecution and the defense, the respective parties exercise their right of peremptory challenge and the following named jurors were called according to law to constitute the jury, viz.: Gustav H. Schneider, S. M. Warner, Richard Starr, W. G. Powers, Don Blankenship, Gus Hoff, G. W. Pittock, A. Shapard, W. B. Dolan, J. F. Kellner, H. F. [25] Schurrer, Paul Bengsch, who were duly sworn to well and truly try the issues joined between John G. Hall, the plaintiff herein, and the Alamo Cattle Company, the defendant herein. W. B. Van Vreen, Raymond Allee, and Maynard Frazier were duly sworn as Court reporters herein. And this being the regular time for an adjournment of this court, the Court duly

admonished the jury and excused them from further attendance upon this Court until Saturday, the 23d day of May, A. D. 1914, at ten o'clock A. M., to which time the further trial of this case is now ordered continued. [26]

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**[Minutes of Court—May 23, 1914—Order Overruling  
Demurrer.]**

*In the District Court of the United States for the  
District of Arizona.*

Minute Entry of May 23d, 1914.

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

The defendant having heretofore filed a demurrer herein, and said demurrer not having been urged, or being now urged by the defendant, it is ORDERED that the same be and it is hereby overruled. [27]



**[Minutes of Court—May 23, 1914.]**

*In the United States District Court for the District  
of Arizona.*

Minute Entry of Saturday, May 23d, 1914.

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO., Sociedad Anonima,  
Defendant.

This case having been continued from Friday, May 22d, 1914, come now the same parties hereto, and come also the jurors herein, their names are called, and all answering thereto respectively, the further trial of this case proceeds as follows: The pleadings herein were then read aloud to the jury by the respective counsel, and short statements made of the issues to be tried herein. Counsel for the plaintiff then moved to amend his complaint by striking out the word "car" on page six, paragraph 6, line thirty-three, and inserting in lieu thereof the word "train," and by inserting before the word "with" on page six, paragraph six, line nine, the following words: "and did comply," and defendant consenting thereto, it is accordingly so done. The plaintiff then moved the Court to place the witnesses under the rule, and it is ordered that all witnesses now present, with the exception of John G. Hall, witness for the plaintiff, and J. Beckford Kibbey, Jr., and Ramon Elias, witnesses for the defendant, be called and placed under the

rule, and thereupon T. J. Donahue and A. M. Joffroy were called as witnesses for the defendant, sworn, and placed under the rule. The plaintiff then to maintain upon his part the issues herein called as witness John G. Hall, who was duly sworn and examined in part, and offered in evidence ten exhibits, Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I" and "J," which were admitted in evidence and ordered filed, and this being the regular time for the adjournment of this Court the Court duly admonished the jury, and excused them from further service in this case until Tuesday, the 26th day of May, A. D. 1914, at ten o'clock A. M., to which time the further trial of this case is now ordered continued. It is further ordered that all witnesses in this case be excused until Tuesday, May 26th, 1914, at ten o'clock A. M. [28]

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[Plaintiff's Exhibit "C"—Letter Dated April 25, 1913, Alamo Cattle Co., S. A., to K. D. Oliver.]

W. BECKFORD KIBBEY, Jr.,  
President.

RAMON ELIAS,  
General Manager.

ALAMO CATTLE CO., S. A.

Magdalena, Sonora, Mexico.

Box 24.

HACIENDA EL ALAMO,

Nogales, Ariz., April 25, 1913.

Mr. K. D. Oliver,

304 American Bank Bldg.,

El Paso, Texas.

My dear Mr. Oliver:

Received your letter of the 21st on my return from Hermosillo yesterday.

Ramon left for the Altar, to endeavor to get a herd turned loose by one of our agents some two weeks ago, and I leave for the Alamo this afternoon.

I will round up everything at once, and move the two year old steers to Destiladero, where they will be ready to cut about the 8th. I have ordered cars, advising them that the order is part of your blanket order. We will expect you here the morning of May 8th, unless you receive further advice from us. Will advise you about how many we can deliver as soon as cattle start north. I expect to move them to Destiladero as early as possible, in order to let them have a good rest before loading.

Yours very truly,

ALAMO CATTLE COMPANY, S. A.

By BECKFORD KIBBEY, Jr.,

Pres.

K:ES.

[Endorsement]: Plff. Exhibit "C." No. 10. Hall vs. Alamo Cattle Co. Admitted and filed May 23, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [29]

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[Plaintiff's Exhibit "D"—Letter Dated April 28, 1913, Manager to W. B. Kibbey, Jr.]

(Carbon Copy.)

Apr. 28, 1913.

W. B. Kibbey, Jr., Esq.,  
c/o First Nat. Bank,  
Nogales, Ariz.

Dear Sir:

Your favor of the 25th to hand and contents noted.



Kindly advise us as promptly as possible the number of head of cattle you will have in the first delivery.

I will arrive at Nogales on the train on the morning of the 8th, unless otherwise advised by you of some change in the program.

Should there be any change, please notify me as promptly as possible, as a man from Montana wishes to come down and be present when the cattle are cut, and I do not want to let him start out ahead of time.

Please advise how many cars you ordered from the agent, and their length. I have also written him for this information, as we must have it to keep our files and routine of business straight.

Yours truly,

---

Manager.

KDO/PBD.

[Endorsed]: Plff. Exhibit "D." Admitted and filed May 23, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. No. 10. Hall vs. Alamo Cattle Co. [30]

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[Plaintiff's Exhibit "E"—Day Lettergram Dated May 3, 1913, K. D. Oliver to Alamo Cattle Co.]

DAY LETTER.

THE WESTERN UNION TELEGRAPH COMPANY.

El Paso, Tex., May 3, 1913.

Alamo Cattle Co.,

c/o First National Bank, Nogales, Ariz.

Unless otherwise instructed I will arrive Nogales

34     *Alamo Cattle Company, Sociedad Anonima,*  
on the ninth to cut 2 yr. old steers. As Montana  
man coming with me must start several days ahead  
of time please answer as to whether conditions favor-  
able for getting cattle also how many first shipment  
will consist of as must have this information for car  
order.

K. D. OLIVER.

Chg. J. G. Hall.

2:45 PM.

[Endorsement]: Plff. Exhibit "E." No. 10. Hall  
vs. Alamo Cattle Co. Admitted and filed May 23,  
1914. George W. Lewis, Clerk. By Effie D. Botts,  
Deputy. [31]

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[Plaintiff's Exhibit "F"—Telegram Dated May 3,  
1913, Alamo Cattle Co. to K. D. Oliver.]

THE WESTERN UNION TELEGRAPH COM-  
PANY.

RECEIVED AT 107 North Oregon St. El Paso.

Phone 4321. Always Open. 206 GS U 10.

Nogales, Ariz., May 3.

K. D. Oliver,

El Paso, Texas.

Will have at least one train load for the tenth.

ALAMO CATTLE CO.

6:33 PM.

[Endorsement]: Plff. Exhibit "F." No. 10. Hall  
vs. Alamo Cattle Co. Admitted and filed May 23,  
1914. George W. Lewis, Clerk. By Effie D. Botts,  
Deputy. [32]

[Plaintiff's Exhibit "G"—Day Lettergram, Dated  
May 4, 1913, K. D. Oliver to Alamo Cattle Co.]

DAY LETTER.

THE WESTERN UNION TELEGRAPH COM-  
PANY.

El Paso, Texas, May 4, 1913.

Alamo Cattle Co.,  
Nogales, Arizona.

Will arrive Nogales morning ninth. Please ar-  
range so we can cut cattle that day and load tenth  
without fail. Wire to-day how many head you will  
have. This information absolutely necessary to  
order proper number of cars. Answer promptly.

K. D. OLIVER.

CHG JGHALL.

[Endorsement]: Plff. Exhibit "G." No. 10. Hall  
vs. Alamo Cattle Co. Admitted and filed May 23,  
1914. George W. Lewis, Clerk. By Effie D. Botts,  
Deputy. [33]

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[Plaintiff's Exhibit "H"—Day Lettergram Dated  
May 5, 1913, Alamo Cattle Co. to K. D. Oliver.]

DAY LETTER.

THE WESTERN UNION TELEGRAPH COM-  
PANY.

RECEIVED AT 107 North Oregon St., El Paso.  
Phone 4321. Always Open; 17 NS. ZS. 20  
BLUE.

NOGALES AZ May 5th, 1913.

K. D. Oliver,  
El Paso, Texas.

Will do all possibly can to have cattle ready by the



36     *Alamo Cattle Company, Sociedad Anonima,*  
tenth expect to have about fifteen hundred head.

ALAMO CATTLE CO.

1151A. 176.

[Endorsement]: Plff. Exhibit "H." No. 10. Hall  
vs. Alamo Cattle Co. Admitted and Filed May 23,  
1914. George W. Lewis, Clerk. By Effie D. Botts,  
Deputy. [34]

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[Plaintiff's Exhibit "I"—Telegram Dated May 7,  
1913, Alamo Cattle Co. to K. D. Oliver.]

THE WESTERN UNION TELEGRAPH  
COMPANY.

RECEIVED AT 107 North Oregon St., El Paso.

Phone 4321. Always Open; 283 GS MH 21 X.

Nogales, Az., May 7, 1913.

K. D. Oliver,

El Paso, Texas.

Cattle will be ready to cut at Destiladara morning  
of ninth wire if you will be here will order cars an-  
swer.

ALAMO CATTLE CO.

733 PM.

Telephone

to Oliver

By S. B.

Time 950.

[Endorsement]: Plff. Exhibit "I." No. 10. Hall  
vs. Alamo Cattle Company. Admitted and Filed  
May 23, 1914. George W. Lewis, Clerk. By Effie  
D. Botts, Deputy. [35]

[Plaintiff's Exhibit "J"—Telegram Dated May 8,  
1913, K. D. Oliver to Alamo Cattle Co.]

THE WESTERN UNION TELEGRAPH COM-  
PANY,

El Paso, Tex., May 8, 1913.

Alamo Cattle Co.,

Care First National Bank, Nogales, Ariz.

Arrive Nogales morning ninth have ordered cars.

K. D. OLIVER.

Chg. J. G. Hall,

8:50 A. M.

[Endorsement]: Plff. Exhibit "J." No. 10. Hall  
vs. Alamo Cattle Co. Admitted and Filed May 23,  
1914. George W. Lewis, Clerk. By Effie D. Botts,  
Deputy. [36]

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[Minutes of Court—May 26, 1914.]

*In the United States District Court for District of  
Arizona.*

Minute Entry of Tuesday, May 26th, 1914.

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO., Sociedad Anonima,  
Defendant.

This case having been continued from Saturday,  
May 23, 1914, come now the same parties hereto and  
come also the jurors herein; their names are called  
and all answering thereto, respectively, the further  
trial of this case proceeds as follows: W. L. Howell,

K. D. Oliver and James A. Johnson were called as witnesses for the plaintiff, sworn and placed under the rule. The plaintiff then, to further maintain upon his part the issues herein, recalled John G. Hall for further examination in chief, and called as witnesses K. D. Oliver and James A. Johnson, who were duly examined and cross-examined, and offered in evidence four exhibits, Exhibits "K," "L," "N," and "O," which were admitted and filed. The defendant then offered in evidence seven exhibits, Exhibits 1, 2, 3, 4, 5, 6, 7, which were admitted and filed, and this being the regular time for adjournment of this court, the Court duly admonished the jury and excused them from further service in this case until Wednesday, May 27th, 1914, at ten o'clock A. M., to which time the further trial of this case is now ordered continued. [37]

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**[Plaintiff's Exhibit "K"—Letter, Dated May 13,  
1913, Alamo Cattle Co. to J. G. Hall.]**

W. BECKFORD KIBBEY, Jr.,  
President.

RAMON ELIAS,  
General Manager.

ALAMO CATTLE CO., S. A.  
MAGDALENA, SONORA, MEXICO.

Box 24.

HACIENDA EL ALAMO.

Nogales, Ariz., May 13th, 1913.

Mr. J. G. Hall,  
El Paso, Texas.

Dear Sir:

Referring to the contract between ourselves and Mr. E. W. Meyers, dated Jan. 16th, 1913, and trans-



ferred to you by him on Feb. 4th, for 4,000 two year old steers and 1,000 four year old steers, to be delivered during April and May, 1913, in trainload lots, beg to advise you that owing to the fact that a herd of two year old steers was tendered you on May 12th, consisting of 1,093 steers from which we asked you to cut a trainload, but which you refused to cut or receive, after having come down expressly to receive these cattle, after due notice according to contract, we consider that you have forfeited all right in the aforesaid contract, and hereby so advise you.

Very respectfully yours,  
ALAMO CATTLE COMPANY, S. A.  
By W. BECKFORD KIBBEY, Jr.,  
Pres.

K: AES.

[Endorsement]: Plaintiff's Exhibit "K," Marked for Identification. No. 10. Hall vs. Alamo Cattle Company. Admitted and Filed May 26, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy.  
[38]

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[Plaintiff's Exhibit "L"—Telegram, Dated May 14, 1913, J. G. Hall to Alamo Cattle Co.]

THE WESTERN UNION TELEGRAPH  
COMPANY.

El Paso, Tex., May 14, 1913.

Alamo Cattle Co.

Care First National Bank, Nogales, Ariz.

I am ready and willing to receive and hereby demand all cattle coming within contract of January

40     *Alamo Cattle Company, Sociedad Anonima,*  
sixteenth with Myers which contract was transferred  
to me. Delivery to be made between May twenty-  
ninth and June first nineteen thirteen in train lots.

Advise when you want cattle cut.

J. G. HALL.

Chg. J. G. Hall.

3:40 P. M.

[Endorsement]: Plaintiff's Exhibit "L," Marked  
for Identification. No. 10. Hall vs. Alamo Cattle  
Co. Admitted and Filed May 26, 1914. George W.  
Lewis, Clerk. By Effie D. Botts, Deputy. [39]

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**[Plaintiff's Exhibit "N"—Telegram, Dated May 11,  
1913, J. G. Hall to Alamo Cattle Co.]**

THE WESTERN UNION TELEGRAPH  
COMPANY.

El Paso, Texas, May 11, 1913.

Alamo Cattle Co.

Nogales, Ariz.

Arrive Nogales to-morrow to receive all cattle com-  
plying with terms of contract.

J. G. HALL.

CHG—J. G. Hall.

[Endorsement]: Plaintiff's Exhibit "N," Marked  
for Identification. No. 10. Hall vs. Alamo Cattle  
Co. Admitted and Filed May 26, 1914. George W.  
Lewis, Clerk. By Effie D. Botts, Deputy. [40]

[Plaintiff's Exhibit "O"—Contract for Purchase and Sale of Cattle, Dated April 11, 1913, J. G. Hall and Clay, Robinson & Co.]

CONTRACT FOR PURCHASE AND SALE OF CATTLE.

THIS AGREEMENT, made and entered into this 11th day of April, 1913, by and between J. G. Hall of Denver, Colorado, hereinafter known as the seller; and Clay, Robinson & Co. of Denver, Colorado, hereinafter known as the buyers:

WITNESSETH AS FOLLOWS: For and in consideration of the prices herein mentioned, which have been mutually agreed upon by both parties to this contract, the seller hereby agrees to sell and deliver off cars in good shipping condition at Denver, Colorado, on or about May 15th, to June 5th, 1913, the following described cattle; about 4,000 or 5,000 head of two year old steers at \$28.00 per head, all to be full age by time of delivery, and in the following brands:

卐 7 , and are to be the same steers received

by the seller from the Alamo Cattle Co., of Magdalena, Sonora, Mexico. The buyers agree to pay all freight, feed and shipping charges necessary to transport said cattle from Nogales, Arizona, to Denver. The seller has the privilege of a 15 per cent cut after all stags, cripples, lump-jaws, sway-backs, blind or diseased steers, or any that for whatever cause are considered unmerchantable, or under age, have been cut out, and this privilege of cut is to be passed on to the buyers or their authorized agent; said cut to be made at the ranches in Mexico.



The seller hereby acknowledges the receipt of Eight Thousand and no/100 Dollars (\$8,000.00) in hand paid this day by the buyers as earnest money on this contract, and which is to be applied on the purchase price at the rate of Two and no/100 (\$2.00) per head as the cattle are loaded; and it is hereby understood and agreed that the seller may make draft on the buyers in payment of the steers as they are loaded at Nogales, and should there be any difference in count when steers are unloaded at Denver, correction of payment shall then be made.

It is further understood and agreed that the buyers  
[41]

sheet #2

shall be entitled to all three year old steers that may be delivered to the seller under his contract with the said Alamo Cattle Co., without any reservations being made at the time of gathering or delivery, until the buyer's contract is filled.

It is understood and agreed that in case delivery of these steers cannot be made on account of either revolutionary trouble or quarantine regulations, the seller is to return to the buyer the advance payment of \$8,000.00 with interest at the rate of 8%.

WITNESS OUR HANDS, this 11th day of April, 1913.

J. G. HALL,  
CLAY, ROBINSON & CO.,  
By J. A. JOHNSTONE, Mgr.

[Endorsement]: Plaintiff's Exhibit "O," Marked for Identification. No. 10. Hall vs. Alamo Cattle Co. Admitted and Filed May 26, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [42]

[Defendant's Exhibit No. 1—Night Lettergram  
Dated May 9, 1913, K. D. Oliver to Agent,  
Southern Pacific Co.]

NIGHT LETTER.

THE WESTERN UNION TELEGRAPH COM-  
PANY.

Received at 1 GS AG 28. NL.

TUCSON, AZ., May 9, 1913.

Agent. Southern Pacific Co.,  
Nogales, Az.

Referring to our file number two car order for  
thirty-two Santa Fe stock cars load your station to-  
morrow please cancel as cattle not ready writing you  
from El Paso.

K. D. OLIVER.

8:30 A. M.

[Endorsement]: Defendant's Exhibit No. 1.  
Marked for Identification. No. 10. Hall vs. Alamo  
Cattle Co. Admitted and filed May 26, 1914. George  
W. Lewis, Clerk. By Effie D. Botts, Deputy. [43]

**[Defendant's Exhibit No. 2—Letter Dated May 24,  
1913, J. G. Hall to J. L. Pope, Agent, Southern  
Pacific Co.]**

Denver Office:  
Great Western Commission Co.,  
Union Stock Yards.

El Paso Office:  
304 American Bank Bldg.  
Telephone 4266.

J. G. HALL,  
Live Stock Commission.

Southern Cattle Bought on Orders.

K. D. Oliver, Manager.

El Paso, Texas, May 24, 1913.

Ref. Our File #2.

J. L. Pope, Esq.,  
Agt. Southern Pacific,  
Nogales, Ariz.

Dear Sir:—

Referring to our car order file number as above and in reply to your favor of the 22nd in regard to same, beg to advise you that it will be impossible for us to get these cattle out this spring, and will therefore cancel the entire order.

Thanking you for your letter, and your attention to this matter, beg to remain,

Yours truly,

J. G. HALL.

By P. B. DIXON.

CC to W. R. Brown, El Paso, Tex.

CC to Agent Santa Fe, Deming, N. M.

[Endorsement]: Defendant's Exhibit No. 2. Marked for Identification. No. 10. Hall vs. Alamo Cattle Co. Admitted and filed May 26, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [44]



**[Defendant's Exhibit No. 3—Letter Dated April 28,  
1913, K. D. Oliver to Agent Southern Pacific  
Co.]**

Denver Office:

Great Western Commission Co.,  
Union Stock Yards.

El Paso Office:

304 American Bank Bldg.  
Telephone 4266.

**J. G. HALL,**

**Live Stock Commission.**

**Southern Cattle Bought on Orders.**

**K. D. Oliver, Manager.**

**El Paso, Texas, Apr. 28, 1913.**

**Ref. Out File #2.**

**Agent Southern Pacific Ry. Co.,  
Nogales, Ariz.**

**Dear Sir:—**

We are in receipt of a letter today from Mr. Kibbey, in which he advise us that he has placed a definite car order in our name, for cars in which to load the first shipment of the cattle purchased from him.

Under date of February 7, we placed an order with you, our file #2, for 150 forty foot Santa Fe stock cars, and the order that Mr. Kibbey has just placed is referring to this order.

Will you kindly furnish us with information as to how many cars Mr. Kibbey has ordered, and whether or not they are Santa Fe forty foot cars.

For your information beg to state that we wish to order all of our cars to be 40 foot Santa Fe cars.

46     *Alamo Cattle Company, Sociedad Anonima,*

Trusting to receive this information from you by  
return mail, beg to remain,

Yours truly,  
K. D. OLIVER,  
Manager.

KDO/PBD.

[Endorsement]: Defendant's Exhibit No. 3.  
Marked for Identification. No. 10. Hall vs. Alamo  
Cattle Co. Admitted and filed May 26, 1914. George  
W. Lewis, Clerk, By Effie D. Botts, Deputy. [45]

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**[Defendant's Exhibit No. 4—Letter Dated May 5,  
1913, J. G. Hall to Agent Southern Pacific Ry.  
Co.]**

Denver Office:  
Great Western Commission Co.,  
Union Stock Yards.

El Paso Office:  
304 American Bank Bldg.  
Telephone 4266.

J. G. HALL,  
Live Stock Commission.  
Southern Cattle Bought on Orders.  
K. D. Oliver, Manager.

El Paso, Texas, May 5, 1913.

Ref. Our File #2.

Agent Southern Pacific Ry. Co.,  
Nogales, Arizona.

Dear Sir:—

Beg to advise you that we will need 32 forty foot  
Santa Fe stock cars to load at your station May 10th.

These cars are intended for the movement of cattle  
purchased from the Alamo Cattle Co., from your  
station to Denver, Colo., via the Santa Fe at Deming.

These are a part of the cars ordered under date of

February 7th, our file number as above.

Will you kindly give this matter your usual prompt attention.

Yours truly,

J. G. HALL.

By P. B. DIXON.

CC to W. R. Brown, El Paso, Tex.

CC to Agent Santa Fe, Deming, N. M.

[Endorsement]: Defendant's Exhibit No. 4. Marked for Identification. No. 10. Hall vs. Alamo Cattle Co. Admitted and filed May 26, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [46]

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**[Defendant's Exhibit No. 5—Letter Dated February 4, 1913, Ed. W. Myers et al. to Alamo Cattle Co.]**

Denver Office:

Great Western Commission Co.,  
Union Stock Yards.

El Paso Office:

304 American Bank Bldg.  
Telephone 4266.

J. G. HALL,

Live Stock Commission.

Southern Cattle Bought on Orders.

K. D. Oliver, Manager.

El Paso, Texas, Feb. 4, 1913.

Alamo Cattle Co., S. A.,

Magdalena, Son., Mexico.

Gentlemen:

Beg to advise that I have this day sold and transferred all my right title and interest to the contract I hold with your Company, dated January 16th, 1913, for four to five thousand two year old steers and one



48     *Alamo Cattle Company, Sociedad Anonima,*  
thousand four year old steers, to J. G. Hall, of El  
Paso, Texas.

Mr. Hall shows his approval of this letter by signit  
with me; and also his willingness and intention to  
carry out the terms of the contract in every way.

Yours truly,  
ED. W. MYERS,  
J. G. HALL,  
By K. D. OLIVER,  
Manager.

[Endorsement]: Defendant's Exhibit No. 5.  
Marked for Identification. No. 10. Hall vs. Alamo  
Cattle Co. Admitted and filed May 26, 1914. George  
W. Lewis, Clerk, By Effie D. Botts, Deputy. [47]

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**[Defendant's Exhibit No. 6—Letter Dated April 21,  
1913, K. D. Oliver to Alamo Cattle Co.]**

Denver Office:  
Great Western Commission Co.,  
Union Stock Yards.

El Paso Office:  
304 American Bank Bldg.  
Telephone 4266.

J. G. HALL,  
Live Stock Commission.  
Southern Cattle Bought on Orders.  
K. D. Oliver, Manager.

El Paso, Texas, Apr. 21, 1913.

Alamo Cattle Co.,  
c/o First Nat. Bank,  
Nogales, Ariz.

Gentlemen:

With reference to the cattle we have purchased  
from you, beg to advise that we would like to receive  
the first train of the two year old steers to load at

Nogales about the 10th of May.

Wish you would advise us by return mail, or by wire if you are delayed much in getting this letter, the exact date it will be necessary for the writer to be at Nogales to go with you to cut the cattle.

We want to receive these two year old steers in trainloads of about 1,000 to 1,500 head, for the man who has purchased these cattle in Montana has several days drive from the Railroad to his ranch, and does not wish to make this drive with only a small bunch.

Awaiting an immediate reply from you, which is very necessary to enable us to definitely place an order for the exact number of cars we will need, (the original blanked order for all having been already placed) beg to remain,

Yours truly,

K. D. OLIVER.

Manager.

KDO/PBD.

[Endorsement]: Defendant's Exhibit No. 6. Marked for Identification. No. 10. Hall vs. Alamo Cattle Co. Admitted and filed May 26, 1914. George W. Lewis, Clerk, By Effie D. Botts, Deputy. [48]

[Defendant's Exhibit No. 7—Night Lettergram  
Dated May 9, 1913, K. D. Oliver to W. B.  
Kibbey, Jr.]

NIGHT LETTER.

THE WESTERN UNION TELEGRAPH COM-  
PANY.

RECEIVED AT 6 GS AG 12. NL.

TUCSON, AZ., May 9, 1913 10th

W. B. Kibbey, Jr.,

Nogales, Az.,

Going El Paso in the morning and will write you  
fully from there.

K. D. OLIVER.

840. AM.

[Endorsement]: Defendant's Exhibit No. 7.  
Marked for Identification. No. 10. Hall vs. Alamo  
Cattle Co. Admitted and filed May 26, 1914. George  
W. Lewis, Clerk. By Effie D. Botts, Deputy. [49]

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[Minutes of Court—May 27, 1914.]

*In the United States District Court for the District  
of Arizona.*

Minute Entry of Wednesday, May 27th, 1914.

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE COMPANY, Sociedad  
Anonima,

Defendant,



This case having been continued from Tuesday, May 26th, 1914, come now the same parties hereto and come also the jurors herein; their names are called and all answering thereto respectively, the further trial of this case proceeds as follows: The plaintiff, to further maintain upon his part the issues herein, recalled James A. Johnson for further examination in chief, and called as witness W. L. Howell, who was duly examined and cross-examined, and offered in evidence, counsel for the defense agreeing, the affidavit of James Gilispie, it being conceded that if the said James Gilispie were present he would so testify. By stipulation of counsel, it was agreed, and so stated, that Ed. W. Myers is a citizen of Texas. James G. Hall was recalled to the stand for further cross-examination, and the plaintiff offered in evidence one exhibit, Exhibit "P," which was admitted and filed, and thereupon the plaintiff rested his case. The defendant then *to* moved the Court for an instructed verdict in its favor and against the defendant, which motion was argued, and thereupon denied by the Court. The defendant then, to maintain upon its part the issues herein, called as witnesses Ed. W. Myers and Ben Sneed, who were duly sworn and placed under the rule, and called as witnesses W. Beckford Kibbey, Jr., and Ramon Elias, who were duly sworn, examined and cross-examined, and offered in evidence an exhibit, Exhibit 8, which was admitted and filed, and this being the regular time for adjournment of this court, the Court duly admonished the jury and excused them from further service in this case until Thursday, the 28th day of

52     *Alamo Cattle Company, Sociedad Anonima,*  
May, A. D. 1914, at ten o'clock A. M., to which time  
the further trial of this case is now ordered continued.  
[50]

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**[Plaintiff's Exhibit "P"—Letter Dated April 18,  
1913, West Coast Cattle Importers Assoc. to K.  
D. Oliver.]**

**EXECUTIVE COMMITTEE:**

Joseph E. Wise, President,  
Calabasas, Ariz.  
R. C. Mossman, 1st Vice-Pres.,  
Kansas City, Mo.  
L. M. Lord, 2nd Vice-Pres.,  
South Omaha, Nebr.  
B. A. Packard, 3rd Vice-Pres.,  
Douglas, Ariz.  
Chas. F. Silva, 4th Vice-Pres.,  
Sacramento, Cal.  
W. B. Kibbey, Jr., Secretary,  
Nogales, Ariz.  
Chas. F. Holler, Treasurer,  
Nogales, Ariz.

**EXECUTIVE COMMITTEE:**

J. M. Rondstadt,  
Tucson, Ariz.  
J. C. Gatti,  
Clifton, Ariz.  
H. J. Saxon,  
Nogales, Ariz.  
C. E. Wiswold,  
Naco, Ariz.  
K. D. Oliver,  
El Paso, Tex.  
L. E. Booker,  
El Paso, Tex.  
Henry Levin,  
Nogales, Ariz.  
E. A. Tovrea,  
Bisbee, Ariz.

**THE WEST COAST CATTLE IMPORTERS'  
ASSOCIATION.**

Headquarters Nogales,  
Arizona.

Nogales, Ariz., April 18, 1913.

Mr. K. D. Oliver,  
304 Am. Bank Bldg.,  
El Paso, Texas.

Dear Sir:

Enclosed please find copy of Dr. Bray's letter of  
the 9th instand.

You are thoroughly aware of just what Dr. Bray  
said in connection with the movement of cattle from  
points south of Magdalena.

During my last meeting with him, I asked him  
what would be his attitude in connection with the

movement of cattle from points south of Magdalena, but from known clean territory. He stated that he would prefer to have me refer the matter to Dr. Melvin, who was present. I then got out the map of Sonora, and pointed out the location of the Espinosa cattle, which are located practically due west of Carbo, and asked Dr. Melvin, in Dr. Bray's presence, if I could move these cattle to my ranch, and export them safely, provided they did not come in contact with the Zepeda cattle, Dr. Melvin's reply was *the* he believed we would be perfectly safe in bringing cattle from known clean territory.

In his letter of the 9th, Dr. Bray practically repudiates his verbal permission, given us at the El Paso meeting, and leaves the whole matter to Dr. Melvin to decide. We are writing Dr. Melvin to-day, asking him to decide the question of the new quarantine line, and on receiving his reply, will advise you regarding his decision.

The question between Dr. Bray and ourselves is a very delicate one, and we do not feel at liberty to state exactly what we think about the stand taken by him. In our reply to his letter, we have simply written him that we note contents of his letter, and are forwarding [51] letter to Dr. Melvin, a copy of which we inclose in Dr. Bray's letter.

We wish you would have a talk with him, and sound him diplomatically regarding what he expects to do in connection with our cattle, as it is of vital interest to us to know as soon as possible what to expect.

If we are unable to get cattle from south of Mag-



54     *Alamo Cattle Company, Sociedad Anonima,*  
dalena, it will complicate an already difficult situa-  
tion.

Yours very truly,  
WEST COAST CATTLE IMPORTERS ASSOC.,  
By W. BECKFORD KIBBEY, Jr.,  
Sec'y.

K:ES.

[Endorsement]: Plaintiff's Exhibit "P." Marked  
for Identification. No. 10. Hall vs. Alamo Cattle  
Co. Admitted and filed May 27, 1914. George W.  
Lewis, Clerk. By Effie D. Botts, Deputy. [52]

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[Defendant's Exhibit No. 8—Telegram Dated May  
13, 1913, Alamo Cattle Co. to K. D. Oliver.]

THE WESTERN UNION TELEGRAPH COM-  
PANY.

RECEIVED AT 107 NORTH OREGON ST., El  
Paso, Phone 4321. Always Open.

70 US ZS 2 1 COLLECT EXTRA.

Nogales Az May—13th via Tucson Az May 14  
K. D. Oliver,

El Paso, Texas.

Myers refuses to compromise advise if you wish to  
go ahead with our verbal agreement.

ALAMO CATTLE CO.,  
KIBBEY President.  
525 P. M.

[Endorsement]: Defendants' Exhibit No. 8.  
Marked for Identification. No. 10. Hall vs. Alamo  
Cattle Co. Admitted and filed May 27, 1914. George  
W. Lewis, Clerk. By Effie D. Botts, Deputy. [53]

[Minutes of Court—May 28, 1914.]

*In the United States District Court for the District  
of Arizona.*

Minute Entry of Thursday, May 28th, 1914.

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO., Sociedad Anonima,  
Defendant.

This case having been continued from Wednesday, May 27th, 1914, come now the same parties hereto and come also the jurors herein; their names are called and all answering thereto, respectively, the further trial of this case proceeds as follows: The defendant then, to further maintain upon its part the issues herein, recalled as witness Ramon Elias for further examination in chief. Harry Nixon was duly sworn as court reporter herein. The defendant then called as witnesses Thomas J. Donahue, Ben Sneed, A. M. Joffory and Ed. W. Myers, who were duly examined and cross-examined, and thereupon the defendant rested its case. The plaintiff then called in rebuttal John G. Hall, and thereupon the plaintiff rested his case. The defendant then moved the Court for a directed verdict in its favor and against the plaintiff, which motion was overruled by the Court, to which ruling of the Court the defendant, in open court, then and there excepted. There being no further testimony offered on either side and

56     *Alamo Cattle Company, Sociedad Anonima,*  
the evidence being closed, argument of the respective  
counsel was had in part, and this being the time for  
an adjournment of this court, the Court duly ad-  
monished the jury and excused them from further  
service in this case until Friday, the 29th day of May,  
A. D. 1914, at ten o'clock A. M., to which time the  
further trial of this case is now ordered continued.  
[54].

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[Minutes of Court—May 29, 1914.]

*In the United States District Court for the District  
of Arizona.*

Minute Entry of Friday, May 29th, 1914.

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO., Sociedad Anonima,  
Defendant.

This case having been continued from Thursday,  
May 28th, 1914, come now the same parties hereto,  
and come also the jurors herein; their names are called  
and all answering thereto respectively, the further  
trial of this case proceeds as follows: The argument  
of counsel was concluded, and the Court thereupon  
instructed the jury orally, and said jury retire in  
charge of T. T. Smith, bailiff, officer of this court,  
first duly sworn for that purpose, to consider their  
verdict. And subsequently said jurors return into  
court, their names are called, and all answering  
thereto, respectively, upon being asked if they have



agreed upon a verdict, through their foreman, report that they have agreed, and thereupon, through their foreman, present their verdict. Whereupon said verdict was ordered recorded as follows:

No. 10.

“JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE CO.,

Defendant.

**Verdict.**

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff, and assess his damages at the sum of Twenty-one Thousand Two Hundred Twenty-five Dollars.

GUST. A. HOFF, Foreman.”

And the Clerk inquiring of said jurors whether such is their verdict, they say that it is and so say they all. Whereupon said jury was ordered discharged from this case. And it is ordered that the defendant be given thirty days to prepare a bill of exceptions and the usual time to prepare an appeal. The defendant then in open court served notice of motion for a new trial, and it was ordered that the said motion for a [55] new trial be set for hearing on Wednesday, the 24th day of June, A. D. 1914, at ten o'clock A. M., and that the defendant have ten days, from this date to prepare and file its motion for a new trial. The plaintiff then moved the Court for judgment on the verdict returned this day, which

58     *Alamo Cattle Company, Sociedad Anonima,*  
motion was granted, and thereupon the following  
judgment was rendered, to which the defendant in  
open court then and there excepted:

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE COMPANY, Sociedad  
Anonima,

Defendant.

### **Judgment.**

This cause having come on regularly for trial on the 22d day of May, 1914, before a jury duly empaneled and sworn to try the issues, plaintiff being present in court in person and by his attorneys, Messrs. F. C. Knollenberg, Charles R. Loomis, George J. Stoneman and Reese M. Ling, and defendant being represented by its attorneys, Messrs. Wm. M. Seabury and Frank J. Barry, and plaintiff having introduced oral and documentary evidence in support of the allegations contained in his complaint, and defendant having introduced oral and documentary evidence in support of the allegations contained in its answer, and the issues in this cause and the evidence having been submitted to the jury for determination on the 29th day of May, 1914, and the Court having charged the jury as to the law in the case, and the jury having returned in the open court its verdict, in words and figures as follows, to wit:

No. 10.

“JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE COMPANY,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff, and assess his damages at the sum of Twenty-one Thousand Two Hundred Twenty-five Dollars.

GUST. A. HOFF, Foreman.”

And plaintiff having on the 29th day of May moved in open court [56] that judgment be entered in accordance with said verdict and said motion having been by the Court granted;

NOW, THEREFORE, it is ordered and adjudged that the plaintiff, John G. Hall, do have and recover from defendant, Alamo Cattle Company, Sociedad Anonima, the sum of Twenty-one Thousand Two Hundred Twenty-five Dollars (\$21,225.00), together with all costs, and that execution issue therefor. [57]

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*In the District Court of the United States in and for  
the District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,

Defendant.



**Petition for New Trial.**

Comes now the defendant, the Alamo Cattle Company above named and moves the Court to vacate and set aside the verdict rendered herein by the jury in the above-entitled cause on or about May 29th, 1914, in favor of the plaintiff and against the defendant above named, and to grant the defendant a new trial in the said cause upon each and all of the following grounds:

**I.**

Upon the ground that said verdict is contrary to and against the law.

**II.**

Upon the ground that errors in law occurring at the trial were committed which require the said verdict to be set aside and a new trial to be granted, and in this connection your petitioner respectfully alleges that the errors last referred to and each of them among others consisted in the erroneous admission and exclusion of evidence upon the trial of said cause in each and all of the following respects:

**1.**

The Court erred in allowing the plaintiff, Hall, as a witness to testify by way of conclusion and not by virtue of any statement of fact that the said plaintiff was prepared [58] and ready to receive and pay for all the cattle the defendant could deliver to him under the contract sued upon, as appears on pages 26 to 28 of the reporter's transcript.

**2.**

And the Court also erred in ruling throughout the

trial of the cause that it was not incumbent upon nor the duty of the plaintiff to prove that he was ready, willing and able to perform his part of the contract sued upon in substance until the defendant had performed its part of said agreement, as appears from pages 120 to 125 of the reporter's transcript, and throughout the charge of the Court as disclosed by the reporter's transcript.

## 3.

The Court further erred in sustaining the objection by plaintiff's counsel to the question propounded by defendant's counsel to the witness Hall (page 49 reporter's transcript) :

“Q. Did you or did you not state to Mr. Myers at El Paso, in substance, that you or Mr. Oliver had made a mistake?”

Also in allowing the witness Hall to answer the question (page 56 reporter's transcript) addressed to the witness by plaintiff's counsel, over the objection and exception of defendant's counsel:

“Q. Mr. Hall, did Clay, Robinson & Co. or their agent, Mr. Johnston, ever indicate to you that this contract that has just been read was cancelled or would be cancelled in the event you were able to deliver cattle purchased, contracted to be purchased from the Alamo Cattle Company?”

and also in denying the motion of the defendant's counsel to strike out the answer of the said witness to said question (page 57 reporter's transcript).

## 4.

The Court also erred in denying defendant's mo-

tion to strike out the answer of the witness, Oliver (pages 71–72 reporter’s transcript) as follows: [59]

“A. Do you know whether or not there was any cancellation of the order for any of these cars? A. I cancelled them myself.

Q. When?

A. I don’t remember the exact date.

Q. Before or after this trip to Mexico about which you testified?

A. That I am not sure, I cancelled them because—if I cancelled them before it was because the cattle would not have been loaded on the date I ordered them for. If I cancelled it afterwards it was after I saw the cattle.”

Mr. SEABURY.—We object to the hypothetical answer of the witness. We think that is not a proper response to the inquiry and we move to strike it out.

The COURT.—I’ll overrule that objection.

Mr. SEABURY.—Exception.”

5.

The Court further erred in sustaining the objection of plaintiff’s counsel to the question propounded by defendant’s counsel to the witness Oliver (page 94 reporter’s transcript) as follows:

“Q. And I ask you, before May 9th, whether you made any arrangements whatever with the First National Bank at Nogales for the guaranteeing of the payment for those cattle?”

6.

The Court erred in denying the motion of defendant’s counsel to strike out the answer of the witness,



Johnston (page 116 reporter's transcript), wherein the witness said:

“A. There was only about twenty or twenty-five per cent of the cattle that was tendered that were up to the sample that I looked at in the first trip. Some of those were not in shipping condition.”

for the reasons stated at the trial by defendant's counsel as it appears from said reporter's transcript.

7.

The Court erred in overruling the objection of defendant's counsel to the question (page 118 reporter's transcript)

“Q. Did you see any runts or stags?”

and by so doing in construing the contract sued upon in substance to mean that if the herd of cattle tendered by defendant to [60] plaintiff contained a substantial number of disqualified cattle, such a herd was not properly tendered by the defendant to plaintiff because of the presence of said defective or unmerchantable cattle therein, which construction of said contract required the defendant to tender and offer plaintiff a herd of cattle which contained no defective or unmerchantable cattle at all, and allowed the plaintiff to refuse to perform his contract, although plaintiff could and should have selected from said herd a train-load of cattle which were in all respects up to the requirements of the contract.

8.

The Court erred in denying the defendant's motion to strike out the answer of the witness, Johnston, to the question (page 120 reporter's transcript):

“Q. What reason did he give?”

9.

The Court further erred in permitting the witness, Hall, over the objection and exception of defendant's counsel to answer the questions propounded to him by the plaintiff's counsel, that appear from page 166 to page 168 of reporter's transcript.

10.

The Court erred in excluding, over the objection and exception of defendant's counsel, all evidence tending to establish and prove the allegations contained in the defendant's counterclaim (pages 200–207 reporter's transcript).

11.

The Court erred in holding and deciding that the amount of damages which the defendant might recover of and from the plaintiff was limited to the sum of Ten Thousand (\$10,000) Dollars, and in holding that such construction of the contract sued upon was not affected by the question: [61]

“At whose suggestion and request the written clauses of the contract sued upon were inserted.”

(Pages 208–209 reporter's transcript.)

12.

The Court erred in sustaining the objection of plaintiff's counsel to the question (pages 248–249 reporter's transcript):

“Q. What, if anything, was said between you and Mr. Oliver with reference to what, if anything, Mr. Myers was going to do if he was present on these occasions?”

## 13.

The Court erred in excluding evidence of a conversation between the witness Elias and one Myers, in the presence of the plaintiff or its duly authorized representative, Oliver (pages 256–257 reporter's transcript).

## 14.

The Court erred in permitting the witness, Joffroy, to testify in response to questions by plaintiff's counsel, over the objections and exceptions of defendant's counsel, as follows (pages 335–336 reporter's transcript) :

“(By Mr. STONEMAN.)

Q. You would not expect people to order cars unless they had a use for them, would you?

Now, Mr. Witness, isn't it customary when cars are ordered and the one who orders them finds that he has no immediate use for them, to cancel that order to save demurrage of a dollar a car?

Mr. SEABURY.—We object to that on the ground that the proof of custom is not admissible—not proper cross-examination.

The COURT.—Objection sustained.

Mr. STONEMAN.—Have you ever known people, anyone else besides Mr. Oliver, to cancel an order for cars because he had no use for them on the day that they were ordered?

The COURT.—I will change my ruling on that because of the fact that the witness stated that it was his duty to know of the cars that were in the yard.



Mr. SEABURY.—But I direct your Honor's attention to the fact that our objection goes to the point that assuming that he has knowledge of the custom, proof of the custom is immaterial and incompetent in this case, because the issue in this case is what Mr. [62] Hall did with reference to this particular shipment, and we claim that proof of custom is incompetent to prove or disprove that issue.

The COURT.—I will permit him to answer the question.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Q. Isn't it the custom for those who order cars to be used on a certain day to cancel that order and re-order in the event that they find that they have no use for the cars as of the date that they are ordered?

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. Yes, sir."

15.

The Court erred in overruling the objection of defendant's counsel to the question propounded by plaintiff's counsel to the witness Myers (page 359 reporter's transcript):

"Q. And you would not be able to realize on your contract if the cattle were not delivered under this wording of the contract: that the said E. W. Myers is to receive the aforesaid consideration of three dollars a head for the two year old steers and four dollars a head for the

four year old steers only in case they are delivered?"

upon the grounds and for the reasons stated at the trial by defendant's counsel, as it appears by said reporter's transcript.

And defendant alleges that each and all of the rulings heretofore specified and complained of herein were prejudicial to the defendant and among other errors committed at the trial resulted in an adverse verdict against the defendant.

### III.

Upon the ground of the insufficiency of the evidence to justify and support the verdict of the jury, among other things, for the reason that there was no evidence establishing the readiness and ability of the plaintiff to perform his part of the contract after May 9th and before May 12, 1913; but, on the contrary, the uncontradicted evidence was the sole ability of the plaintiff Hall to perform his part of the contract resulting from his sale of the cattle to Clay, Robinson & Company by and through a representative [63] of Clay, Robinson & Company, namely, the witness Johnston, and that the said Johnston refused to accept the said cattle on May 9th, from which it follows that on May 12th, 1913, the plaintiff was not ready, willing or able to perform his part of the contract sued upon.

### IV.

Upon the ground that the learned Court further erred in denying the motion of the defendant made at the close of the plaintiff's case (pages 168-173 reporter's transcript) for a directed verdict in its

favor, and also in denying the renewal of said motion duly made by defendant's counsel (pages 362-363 reporter's transcript) at the close of all of the evidence, upon the ground that the plaintiff's evidence showed that prior to the commencement of suit and about the 12th day of May, 1913, the defendant had made and entered into a valid contract with the plaintiff for the purpose of compromising the dispute which then and there existed between the plaintiff and the defendant, with reference to the contract sued upon herein, and for the purpose of superseding and abrogating the contract sued upon, for the reason that such proof constituted a fatal variance with the pleadings in said cause; and upon the ground of said variance and because the plaintiff had proved a cause of action not alleged in the complaint, which was in reality a substitute for the cause of action sued upon, the plaintiff was not entitled to a verdict and defendant was entitled to judgment, directing a verdict in its favor against the plaintiff.

## V.

The learned Court further erred in each and all of the following respects:

## 1.

The Court erred in declining and refusing to charge the jury as duly requested by defendant in writing, which request [64] was duly submitted to the Court before the close of the evidence and before the Court charged the jury, as follows:

“Defendant's Written Request No. 2.

By its terms it was the duty of the defendant upon receipt of fifteen (15) days' notice to de-



liver upon cars furnished by the plaintiff at Nogales, Arizona, during the months of April and May, 1913, in train-load lots from four thousand (4,000) to five thousand (5,000) head of two year old and one thousand (1,000) head of four year old steers of a quality as good or better than Terrasas cattle.'

2.

The Court likewise erred in refusing to give defendant's written request No. 3, so presented to the Court as aforesaid:

"Defendant's Written Request No. 3.

But I charge that it was incumbent upon and was the duty of the plaintiff under the contract to give the defendant fifteen (15) days' notice of each delivery; to furnish the cars at Nogales, Arizona, to receive the cattle; and to guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales before each shipment crossed the line, and to make such payment when the cattle were delivered on board of the cars."

3.

The Court likewise erred in refusing to give defendant's written request No. 4, so presented to the Court as aforesaid:

"Defendant's Written Request No. 4.

I charge you that the duty of the defendant to deliver the specified cattle depended upon prior notice by the plaintiff to the defendant to deliver the cattle to him and upon the willingness and ability of the plaintiff to receive the cattle and

to pay for them when they were placed on board the cars furnished by the plaintiff."

## 4.

The Court likewise erred in refusing to give defendant's written request No. 10, so presented to the Court as aforesaid:

"Defendant's Written Request No. 10.

If you find that the defendant is entitled to a verdict and that it sustained actual damage in excess of ten thousand (\$10,000) dollars already received, you will then ascertain and determine what, if any, sum in addition thereto and not exceeding the sum of seven thousand three [65] hundred (7,300) dollars in addition, the defendant is entitled to recover from the plaintiff by way of counterclaim."

## 5.

The Court likewise erred in refusing to give defendant's written request No. 11, so presented to the Court as aforesaid:

"Defendant's Written Request No. 11.

In this connection if you find that the plaintiff breached the contract while the defendant was free from fault and ready and willing to perform its part of the contract, you will award to the defendant such sum not exceeding seven thousand three hundred (\$7,300) dollars in addition to the ten thousand (\$10,000) dollars, as in your judgment will reasonably compensate the defendant for the actual loss and damage, if any were sustained by it, over and above the said ten thousand (\$10,000) dollars by

reason of the plaintiff's breach of the contract."

6.

The Court likewise erred in refusing to give defendant's written supplemental request No. 1, so presented to the Court as aforesaid:

"Defendant's Written Supplemental Request No. 1.

If you find from the evidence that defendant tendered and offered to the plaintiff a herd of cattle in May, 1913, from which the plaintiff could have cut a train-load of two year old steers, as good or better than Terrasas cattle, and that plaintiff refused to receive them, then you must find a verdict for the defendant."

7.

The Court likewise erred in refusing to give defendant's written supplemental request No. 2, so presented to the Court as aforesaid:

"Defendant's Written Supplemental Request No. 2.

I further charge you that the provision in the contract which required the buyer to give 15 days' notice before the delivery of each shipment was a provision for the benefit of the seller."

8.

The Court likewise erred in refusing to give defendant's written supplemental request No. 3, so presented to the Court [66] as aforesaid:

"Defendant's Written Supplemental Request No. 3.

I further charge you that, under the contract, the seller had the right and privilege to tender and offer to the buyer, during April or May,



1913, the cattle called for in the contract, in train-load lots, without prior notice and demand from the buyer, and if you find that the defendant did during May, 1913, duly tender such cattle to the plaintiff, and that he refused or failed to accept them, then I charge you that the plaintiff breached the contract, and your verdict must be for the defendant, unless you find that the defendant waived the particular breach in question.”

## 9.

The Court likewise erred in refusing to give defendant's written supplemental request No. 4, so presented to the Court as aforesaid:

“Defendant's Written Supplemental Request No. 4.

I further charge you that it was not contemplated by the terms of the contract sued upon that the plaintiff could require all of the cattle called for under the contract to be delivered in one shipment or at one time. A reasonable construction of the contract entitled the defendant to make deliveries during April and May, in train-load lots, and defendant was not required to deliver all the cattle under the contract in one shipment or at one time, pursuant to the notice contained in plaintiff's telegram dated May 14th.”

## 10.

The Court likewise erred in refusing to give defendant's written supplemental request No. 7, so presented to the Court as aforesaid:

“Defendant’s Written Supplemental Request No. 7.

I further charge you that, even if you find that the cattle tendered to plaintiff on May 9th or May 12th, or both, were not up to the contract, yet if you believe and find that, prior to those dates or either of them, the plaintiff was not ready, willing and able to perform his part of the contract, then you must find for the defendant.”

VI.

The learned Court further erred in giving, at the request of the plaintiff, over the exception duly taken by the defendant, the plaintiff’s written request No. 5, as follows: [67]

“Plaintiff’s Written Request No. 5.

You are also instructed that the burden of proof is upon the Alamo Cattle Company before they can recover judgment against the plaintiff, to show that the cattle alleged to have been tendered on May 9th and May 12th, 1913, fully complied with the contract in every respect.” and also in giving plaintiff’s written request No. 7, as modified by the Court:

“Plaintiff’s Written Request No. 7, as Modified by the Court.

You are instructed that if you believe the cattle tendered on or about May 9th or May 12th did not comply with the contract as far as quality, ages and numbers are concerned, the letter from the defendant dated May 13, 1913, constituted a breach of the contract on the part

of the defendant and justified the plaintiff in treating it as violated by the defendant and at an end.”

(page 371 reporter’s transcript); to all of which defendant duly excepted.

## VII.

The Court further erred in charging the jury upon its own motion.

“You are instructed that under the terms of the contract sued upon, the obligation was imposed upon the defendant to gather and deliver a train-load of cattle complying in all respect as to grade and quality with the requirements of the contract, and plaintiff was under no obligation to examine and inspect or cut from the herd of cattle gathered for delivery by defendant cattle not up to such requirements. In other words, the plaintiff is not, under the terms of the contract sued upon, required to cut from any herd of cattle gathered, such cattle as there might be in the herd, consisting of runts, stags, cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship and unmerchantable cattle, cattle under two years old, and all cattle not of grade as good or better than Terrasas cattle.”

upon the ground that such instruction placed an erroneous construction upon the terms and provisions of the contract sued upon, and in effect relieved the plaintiff of the necessity of accepting a train-load of cattle which were in all respects in



accordance with the terms of the contract, provided such train-load of said cattle could have been cut from the herd of cattle [68] tendered by the defendant to the plaintiff; and upon the further ground that it permitted the jury to find a verdict for the plaintiff even though the jury might have found that there were only a few unmerchantable cattle, unsubstantial in amount, in the herd of cattle so tendered to the plaintiff, and relieved the plaintiff of his obligation and duty under such circumstances to point out and designate to the defendant which, if any, of such cattle were claimed by him to have been unmerchantable, and for that reason unacceptable to him under the terms of said contract; and withdrew from the jury the right to find that notwithstanding the presence in the herds so tendered by defendant to plaintiff of one or more cripples or other unmerchantable cattle, that in reality the defendant substantially performed its contract with the plaintiff by tendering a full train-load lot of good and merchantable cattle under and pursuant to and in strict accordance with the terms of the contract sued upon.

#### VIII.

The Court further erred in instructing the jury as follows:

“You are instructed that under the terms of the contract sued upon, the plaintiff was under no obligation to arrange for payment of the cattle to be delivered until and unless the defendant had gathered and offered for delivery in the Republic of Mexico cattle of the grade

and quality required under the terms of the contract and in numbers sufficient to constitute train-load lots, after deducting 15 per cent. of contract cattle.”

(Page 372 reporter’s transcript.)

IX.

The Court further erred in instructing the jury as follows:

“Unless therefore you find from the evidence and believe that the defendant actually gathered contract cattle in train-load lots, ready for delivery on board cars at Nogales, Arizona, plaintiff was under no obligation to arrange for payment therefor in a manner satisfactory to the First National Bank of Nogales, Arizona.”

(Page 373 reporter’s transcript.) [69]

X.

The Court further erred in instructing the jury as follows:

“You are instructed that no duty devolved upon the plaintiff to cut from any cattle gathered by the defendant, runts, stags, cripples, lump-jaws, sway-backs, cattle too thin to ship or unmerchantable cattle, but that under the terms of the contract, the duty devolved upon the defendant of gathering and tendering for delivery to the plaintiff, cattle in train-load lots, of full ages, exclusive of cattle of the descriptions above mentioned and in numbers so as to permit of a cut by plaintiff of 15 per cent of clean, contract merchantable cattle and still leave a train-load lot to be delivered on board

cars at Nogales, Arizona.”

(Pages 373-374 reporter's transcript.)

XI.

The Court further erred in charging the jury (pages 376-377 reporter's transcript):

“ \* \* \* and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material issues in this case. I say it seems to me that they are not. The main issue of fact to be presented to you for your consideration being whether or not the cattle tendered on or about May 9th or May 12th, 1913, were in reality as good as or better than Terrasas cattle, in train-load lots and in the numbers and of the brands, ages, grades and quality required under the terms of the contract, whether or not the plaintiff was justified in his refusal to take the cattle. I say it seems to me that those two issues are the main issues to be submitted to you for your determination.

I think, Gentlemen, I'll repeat that: under the facts and testimony in this case it is shown that the cattle, variously estimated at from one thousand to fourteen hundred head and alleged to have been tendered by the defendant



to the plaintiff on or about May 12, 1913, under the contract, were not accepted or received by the plaintiff and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars are material—material issues in this case.”

## XII.

The Court further instructed the jury (pages 379–380 [70] reporter’s transcript):

“Therefore, it seems to me \* \* \* nor is it material to inquire whether or not the plaintiff had made financial arrangements satisfactory to the bank at Nogales, or had made satisfactory arrangements to have on hand cars to receive these cattle. In other words, it seems to me that it don’t get to those points, they having gotten to the point where the contract was breached by one party or the other before the time arrived for the plaintiff to make these financial arrangements or these arrangements for cars or for the defendant to deliver the cattle on board the cars at Nogales Station, Arizona.”

WHEREFORE, your petitioner respectively prays that the verdict rendered herein on May 29, 1914, may be vacated and set aside, and that a new

trial of the issues in said case may be granted to your petitioner upon each and all of the aforesaid grounds.

Dated this 6th day of June, 1914.

FRANK J. BARRY,

Nogales, Arizona,

WILLIAM M. SEABURY,

Phoenix, Arizona,

Attorneys for Defendant.

Please take notice that the within notice will be brought to the attention of the Court on June 24, 1914, at the opening of court on that day or as soon thereafter as counsel may be heard at the Federal Courtroom, Tucson, Ariz.

FRANK J. BARRY,

WILLIAM M. SEABURY,

Attorneys for Defendant.

DeR.

Dated 6 day of June, 1914.

To Messrs. Stoneman & Ling,

Messrs. Loomis & Knollenberg.

Served with a copy of the within Petition for a New Trial this 6th day of June, 1914.

GEO J. STONEMAN,

REESE M. LING,

By M. C. WEAVER.

[Endorsements]: No. 10 (Tucson). In the District Court of the United States in and for the District of Arizona. John G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defendant. Petition for New Trial. Filed June 8th, 1914, at

80 *Alamo Cattle Company, Sociedad Anonima,*  
2 o'clock P. M. George W. Lewis, Clerk. By Geo.  
T. Purves, Deputy Clerk. [71]

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**[Order Overruling and Denying Petition for a New  
Trial.]**

*In the United States District Court for the District  
of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

THE ALAMO CATTLE COMPANY, Sociedad  
Anonima,

Defendant.

And now comes the defendant by its attorney and files herein and presents to the Court its petition and motion for a new trial of this cause, and this matter coming on this day regularly to be heard. William M. Seabury, Esq., appearing as counsel for the defendant on behalf of said motion, and George J. Stoneman, Esq., appearing on behalf of the plaintiff in opposition thereto:

Now, on consideration thereof, the Court does, over the exception of the defendant duly made, overrule and deny said petition and motion for a new trial and refuses to grant defendant a new trial of this cause.

WM. H. SAWTELLE,

Judge.

Dated this 24 day of June, 1914.



[Endorsements]: No. 10 (Tucson). In the United States District Court for the District of Arizona. John G. Hall, Plaintiff, vs. The Alamo Cattle Company, Sociedad Anonima, Defendant. Order. Filed June 24, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [72]

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*In the United States District Court for the District  
of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

**Petition for Writ of Error.**

And now comes the Alamo Cattle Company, Sociedad Anonima, defendant in the above-entitled cause, and says that on the 29th day of May, 1914, this Court entered judgment herein in favor of the plaintiff and against this defendant for the sum of Twenty-one thousand two hundred twenty-five 00/100 (\$21,225.00) Dollars and costs of suit, in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of,

82 *Alamo Cattle Company, Sociedad Anonima*,  
and that a transcript of the records, proceedings,  
and the papers of this cause, duly authenticated  
may be sent to said Court of Appeals.

FRANK J. BARRY,

W. M. SEABURY,

Defendant's Attorneys.

[Endorsements]: No. 10 (Tucson). In the United  
States District Court for the District of Arizona.  
John G. Hall, Plaintiff, vs. Alamo Cattle Company,  
*Sociedad Anonima*, Defendant. Petition for Writ  
of Error. Filed June 24, 1914. George W. Lewis,  
Clerk. By Effie D. Botts, Deputy. [73]

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**[Order Allowing Writ of Error and Fixing Amount  
of Bond.]**

*In the District Court of the United States for the  
District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, *Sociedad Anonima*,  
Defendant.

And now comes the defendant by its attorneys,  
and filed herein and presented to the Court its peti-  
tion praying for the allowance of a writ of error  
and assignment of errors intended to be urged by it,  
praying also that a transcript of the record and pro-  
ceedings and papers, from which the judgment was  
entered, duly authenticated, may be sent to the  
United States Circuit Court of Appeals for the Ninth

Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow the writ of error upon defendant giving bond, according to law, in the sum of One Thousand Dollars.

June 24, 1914.

WM. H. SAWTELLE,  
Judge.

[Endorsements]: No. 10 (Tucson). In the District Court of the United States for the District of Arizona. John G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defendant. Order Allowing Writ of Error. Filed June 24, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [74]

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*In the United States District Court for the District  
of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

### **Assignment of Errors.**

The defendant, the Alamo Cattle Company, Sociedad Anonima, in connection with and as a part of its petition for a writ of error filed herein, makes the following assignments of error which it avers were committed by the Court in the rendition of the judgment against the defendant and in the proceed-



ings in said cause before and after the rendition of said judgment appearing in the records herein, that is to say:

I.

Upon the ground that said verdict is contrary to and against the law.

II.

That the Court erred in overruling defendant's objection to the following question propounded to the plaintiff by his attorney and in admitting the evidence evoked by said question upon the ground that said question called for, and said evidence is, a conclusion and not a statement of fact upon a matter which is not expert in nature, as follows:

Q. Now, Mr. Hall, with reference to your ability to pay for these cattle in the event the contract cattle, or cattle called for and up to the amount called for in the contract have been tendered to you, were you or were you not at that time ready, [75] willing and able to pay for a train-load of cattle?

Mr. SEABURY.—We object to that, if your Honor please. We think that the question as put calls for the conclusion of the witness upon a matter which is not expert in nature, and that the witness should be required to state what, if any, financial ability he had at that time to take up the contract—not his mere conclusion that he was able to pay one hundred and twenty thousand dollars, but the fact that he was able to do so.

The COURT.—Is it necessary for the plaintiff to show that under the contract at all? The contract is for these cattle and payment, as described in the

contract, is to be guaranteed in a manner satisfactory to the First National Bank of Nogales before such shipment crosses the line. Now, until the cattle have been furnished in accordance with the contract, is it necessary for the plaintiff to show anything about his financial ability?

Mr. SEABURY.—Does your Honor mean that the proof would be to indicate a breach on the part of the defendant, that being a part of the plaintiff's case that he was ready, willing and able to perform his part of it?

The COURT.—I mean to say that, if the jury come to the conclusion that the cattle of the kind and character specified in the contract were never delivered to them, as is contended by the plaintiff, then, if the jury find that to be the case, would the question of financial ability cut any figure in this case at all?

Mr. SEABURY.—I believe your Honor's view is right: that, if they conclude that there was a breach on the part of the defendant, that would relieve the plaintiff of the necessity of proving his ability to perform at some future date, but I don't believe it relieves the plaintiff of the obligation to prove the ability to perform the contract up to the time of the alleged breach.

The COURT.—I don't think so either, but,—

Mr. SEABURY.—My objection, if your Honor please, was addressed to [76] the form more than the substance. I objected to the witness being asked his conclusion as to his financial ability to pay one hundred and twenty thousand dollars. I thought he ought to be required to state some facts to indicate.

The COURT.—It seems to me that that would be a matter for your cross-examination. I overrule.

Mr. SEABURY.—I except.

Mr. STONEMAN.—I don't want the jury to obtain a wrong impression from the statement of counsel. The contract does not require that the plaintiff should be able to pay one hundred and twenty thousand dollars. It only requires that he should be able to pay for each shipment in train-load lots as it crosses the line.

Mr. SEABURY.—Which would make a total of one hundred and twenty thousand dollars.

The COURT.—Yes, when delivered.

Mr. SEABURY.—I don't mean to infer that he had to have the one hundred and twenty thousand dollars in his hand.

(By Mr. STONEMAN.)

Q. What is your answer to the question, Mr. Hall?

A. I was prepared and ready to receive and pay for all the cattle that they could deliver to me under the contract.

### III.

The Court erred in sustaining plaintiff's objection to a question propounded by defendant to plaintiff upon his cross-examination by which defendant proposed to elicit testimony to show that the plaintiff had made an admission against interest. Said question was as follows:

Q. Did you or not state to Mr. Myers at El Paso, in substance, that you, or Mr. Oliver, had made a mistake?

Mr. STONEMAN.—We object, if your Honor



please, on the ground that it is not proper cross-examination upon any subject upon [77] which he was examined in chief, and not competent unless counsel desire to make this witness their own witness for this purpose.

The COURT.—How is that material, Mr. Seabury, if he did make a mistake? Is that material in this case? He might have come to that conclusion, in view of the facts and circumstances, but would that shed any light on whether or not this contract had been complied with by the defendant or by himself?

Mr. SEABURY.—We thought, if your Honor please, that an admission to indicate that Mr. Hall admitted at that time that he was in fault; the expression that he had made a mistake in not accepting the cattle, we thought, included such an inference, and if so, it would be an admission against interest, and we have a right to show that Mr. Hall did say that he said so to him at that time.

The COURT.—Objection sustained.

Mr. SEABURY.—We except.

#### IV.

The Court erred in overruling defendant's objection to the following question propounded to the plaintiff by his counsel and in denying defendant's motion to strike out the answer of the said witness to said question upon the ground that the question was irrelevant and the testimony is not binding on the defendant, as follows:

(By Mr. STONEMAN.)

Q. Mr. Seabury asked you, Mr. Hall, has just asked you about this contract with Mr. Johnston, acting for

88 *Alamo Cattle Company, Sociedad Anonima,*  
Clay, Robinson & Company. I hand you this paper  
and ask you to tell me what that is.

A. This is the original contract that I made with  
Clay, Robinson & Co. for the purchase of these cattle.

Mr. STONEMAN.—We offer it in evidence and  
ask that it be marked plaintiff's exhibit with the  
proper designation.

Mr. SEABURY.—No objection. [78]

Received in evidence and marked Plaintiff's Ex-  
hibit "O."

Exhibit read to jury.

Q. Mr. Hall, did Clay, Robinson & Co. or their  
agent, Mr. Johnston, ever indicate to you that this  
contract that has just been read was cancelled or  
would be cancelled in the event you were able to de-  
liver cattle purchased, contracted to be purchased  
from the Alamo Cattle Company?

Mr. SEABURY.—We object to the question as not  
relevant to the case and not binding upon the defend-  
ant.

The COURT.—What is the purpose of that?

Mr. STONEMAN.—If your Honor please, it has  
been attempted to be brought out on cross-examina-  
tion. The evident intent of the question is to show  
that this contract of Clay, Robinson & Co. was can-  
celled before—according to Mr. Hall's testimony,—  
the Alamo Cattle trade was declared off. For that  
reason the source of the ability of Mr. Hall to pay  
for the cattle that might be delivered under the Alamo  
contract had failed and was no longer available. I  
simply was asking it on account of the cross-examina-  
tion.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

Q. What is the answer?

A. I hardly know how to answer that question. There was no formal cancellation of the contract. They still wanted the cattle and I gave them all the assistance I could and furnished them several thousand head of cattle to take the place of these cattle that I should have got from the Alamo Cattle Company.

Mr. SEABURY.—We move to strike the answer out as not responsive and also upon the ground that the answer includes alleged statements between Mr. Hall and Mr. Johnston which are in no way binding upon the defendant in this case. [79]

The COURT.—The statement was made by Mr. Johnston, you say?

Mr. SEABURY.—Yes, your Honor. The answer included alleged statements, as I understood it, between this gentleman and Mr. Johnston. His desire to comply with the Clay, Robinson contract which is in no way material or relevant to the issue here.

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

## V.

The Court erred in denying defendant's motion to strike out the answer of plaintiff's witness Oliver to a question propounded by plaintiff's counsel on the ground that said answer is in improper hypothetical form and is not responsive to said question, as follows:

Q. Do you know whether or not there was any can-



cellation of the order of any of these cars?

A. I cancelled them myself.

Q. When? A. I don't remember the exact date.

Q. Before or after this trip to Mexico about which you testified.

A. That I am not sure. I cancelled them because—if I cancelled them before, it was because the cattle would not have been loaded on the date I ordered them for. If I cancelled it afterwards, it was after I saw the cattle.

Mr. SEABURY.—We object to the hypothetical answer of the witness. We think that it is not a proper response to the inquiry and we move to strike it out.

The COURT.—I overrule that objection.

Mr. SEABURY.—Exception.

## VI.

The Court erred in sustaining plaintiff's objection to a question propounded to plaintiff's witness Oliver by defendant upon his cross-examination by which defendant proposed to elicit testimony to show that plaintiff was not ready, willing and able [80] to perform the contract on his part as alleged in the complaint. Said question was as follows:

Q. And I ask you, before May 9th, whether you made any arrangements whatever with the First National Bank at Nogales for the guaranteeing of the payment for those cattle?

Mr. STONEMAN.—We object for the reason that there is no evidence upon which that question can be based, in that it does not appear that the cattle were contract cattle ready for delivery free on board cars

at Nogales, and, under the contract, we don't have to make arrangements except under those conditions.

The COURT.—I would like to hear counsel for the defendant on that.

Mr. SEABURY.—I don't think I care to be heard on it, your Honor.

The COURT.—I sustain the objection.

Mr. SEABURY.—I except.

## VII.

The Court erred in denying defendant's motion to strike out the answer of plaintiff's witness Johnston to a question propounded by plaintiff's counsel on the ground stated in defendant's motion, as follows:

Q. What proportion of the cattle in that herd were below the grade of Terrasas cattle?

A. There was only about twenty or twenty-five per cent of the cattle that was tendered that were up to the sample that I looked at in the first trip. Some of those were not in shipping condition.

Q. Irrespective of the samples—

Mr. SEABURY.—I move to strike out the last answer of the witness, on the ground that it is not the proper test of performance under this contract as to whether or not the cattle exhibited [81] to him in May, 1913, were as good as the samples which he looked at in April, 1913, it not appearing that the defendant had shown him anything in April, 1913.

The COURT.—I understood him to say that they went and looked at cattle that were to be delivered. Overruled.

Mr. SEABURY.—Exception.

## VIII.

The Court erred in overruling defendant's objection to the following questions propounded by plaintiff to his witness Johnston upon the ground that in overruling the objection the Court construed the contract sued upon in substance to mean that if the herd of cattle tendered by defendant to plaintiff contained a substantial number of disqualified cattle, such a herd was not properly tendered by the defendant to the plaintiff because of the presence of said defective or unmerchantable cattle therein, which construction of said contract required the defendant to tender and offer plaintiff a herd of cattle which contained no defective or unmerchantable cattle at all, and allowed the plaintiff to refuse to perform his contract, although plaintiff could and should have selected from said herd a train-load of cattle which were in all respects up to the requirements of the contract, as follows:

Q. Did you see any unmerchantable cattle in the bunch, Mr. Johnston?      A. Yes, sir.

Q. Did you see any cripples?

A. There were sore-footed cattle.

Q. Any lump-jaws, sway-backs or blinds?

A. Yes, there were sway-backs. I don't know as I noticed any lump-jaws.

Q. Did you see any runts or stags?

A. Yes, quite a number.

Mr. SEABURY.—We interpose objection to this line of examination, that even if the herd contained a substantial number of disqualified cattle, the plaintiff had the opportunity and privilege under his [82]



contract to cut out all of those, and in addition to cut fifteen per cent after that. So, unless this witness is prepared to testify that the herd did not contain a train-load of—

Mr. STONEMAN.—I can direct your Honor's attention that there is nothing in this contract that required us to clean the herd. The only thing—and that is optional—is that we might cut fifteen per cent out of this herd. If you will show me anything in that contract, if your Honor please, requiring us to clean that herd, I am almost willing to quit this lawsuit.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

### IX.

The Court erred in denying defendant's motion to strike out the answer of plaintiff's witness Johnston to a question propounded by plaintiff on the ground that the testimony evoked is wholly immaterial to the issues involved in this case, as follows:

Q. What reason did he give?

A. He stated that one particular brand of cattle that he had explained to me about wanting, white-faced cattle they called them and owned by a certain party, had been refused delivery on account of the Constitutional government making a demand on the party for eighteen thousand dollars, and the owner of the cattle said that he was going to keep his cattle, hoping that in the future he might be able to sell his cattle and keep his money. If he sold the cattle, the new government would take it away from him, and consequently he couldn't get those cattle.

Mr. SEABURY.—I move to strike out the answer, if your Honor please, as being wholly immaterial to the issues involved in this case.

The COURT.—Objection overruled.

Mr. SEABURY.—Exception. [83]

X.

The Court erred in overruling defendant's objection to the following questions propounded to the plaintiff by his counsel for the reasons set forth below, as follows:

Q. You mean—was that agreement based upon any new consideration?

A. What do you mean by new consideration?

Q. Was it a proposal or a new contract—a proposal for avoiding trouble on the old contract?

Mr. SEABURY.—We object on the ground that it appears already from the statement made by Mr. Hall that it was a contract which comprised mutual promises, and that the mutual promises of each party was ample and sufficient to support the agreement.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

A. It was done as a compromise over this contract that is now in controversy, simply to avoid getting into a lawsuit.

Mr. STONEMAN.—Q. Did you at that time, or at any other time, say to Mr. Kibbey, or to Mr. Elias, that you would waive any right under the present contract? A. No, sir.

Mr. SEABURY.—Will you wait, please, Mr. Hall, until we have time to make our objections?

The WITNESS.—I beg your pardon.

Mr. SEABURY.—We object to it, if your Honor please, upon the ground that the question is leading and not proper redirect examination.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Your answer?      A. No, sir.

Q. Did Mr. Kibbey or Mr. Elias deliver to you any other cattle under that proposed agreement, or under the first contract?    [84]

Mr. SEABURY.—We object to that if your Honor please, in so far as the question relates to the delivery under the contract in the suit, upon the ground that it is already answered; and in so far as it relates to the contract to which Mr. Hall has just testified, on the ground that it is not within the pleadings in this action, and as such is incompetent.

The COURT.—Overruled.

Mr. SEABURY.—Exception.

Mr. STONEMAN.—Q. Was there any delivery?

A. None whatever.

Q. As a matter of fact, on the 13th day of May, 1913, you received a letter from the Alamo Cattle Company stating that your contract was at an end?

A. Yes, sir.

Mr. SEABURY.—We object to the question as very leading and not proper redirect examination, and according to my recollection, it is in contradiction of the record—the evidence in this case already.

The COURT.—I will have to see the letter before I can rule on that.

Mr. STONEMAN.—Letter under date of May 13, 1913; may I read it, your Honor?



The COURT.—It is not one that has been read?

Mr. STONEMAN.—Yes, sir, it is an exhibit in the case, Plaintiff's Exhibit "K." (Reads the letter to the Court.)

The COURT.—What date is that?

Mr. STONEMAN.—That letter is dated May 13, 1913, at Nogales, Arizona.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

## XI.

The Court erred in sustaining plaintiff's objection to the introduction of and excluding all evidence offered by the [85] defendant tending to establish and prove the allegations contained in the defendant's counterclaim, as follows:

Q. Now, for the purpose of fulfilling your contract with Mr. Hall, had you or had you not purchased and gathered approximately five thousand head of cattle?

Mr. STONEMAN.—We object to it as leading and suggestive.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

Q. Tell us what you did with reference to the purchase and gathering of cattle for the performance of the contract with Mr. Hall.

Mr. STONEMAN.—I ask that the witness be confined to a time now other than has been already testified to. If he has made any endeavor to gather any other cattle.

Mr. SEABURY.—May I say, your Honor, that this is offered in support of our counterclaim. That is the purpose of it.

Mr. KNOLLENBERG.—If your Honor please, we object to the counsel introducing any evidence on the matter of his counterclaim, if that is the purpose of the question. According to the contract or at least our view of the contract, which is admittedly made and executed by the defendant, the damages in that contract that there was a breach on our part has been liquidated and regardless of the damage which the defendants may have sustained by virtue of our breach of it, if we did breach it, have already been fixed by them and they have made their bed and they must lie on it and therefore we object to counsel putting in any evidence tending to show any damages other than the damages that have been fixed in the contract.

Mr. SEABURY.—I direct your Honor's attention to a paragraph of this contract, which is the substance of the suit, Plaintiff's Exhibit "A," which says that: the seller hereby acknowledges [86] receipt of ten thousand dollars, United States currency, in hand paid this day by the buyer, who agrees to pay the balance of the purchase money when said cattle are delivered on board cars, and failing to do so, he shall forfeit the amount or amounts advanced under this contract. I observe that there is a period at that place. There was no statement of any kind of limitation to the effect that in no event could the defendant in this case, namely, the seller, be prejudiced by a breach of contract in excess of ten thousand dollars. We think that the following clause is of a different character. The following is this: The seller agrees to pay two dollars in addition to re-



turning the forfeit on each head he fails to deliver on this contract, which shall constitute an entire claim for damages. In other words, the limitation on the recovery in this section was placed not on the seller, but on the buyer; and it was expressly provided by the contract that in no event should the seller recover more than two dollars per head for each head of cattle that was undelivered under the contract, plus the return of the two dollars per head out of the ten thousand dollars already received. I think there is just that difference between the two clauses. By the contract it is expressly limited that the entire claims for damages, as the expression goes, so far as the buyer is concerned, but so far as the seller is concerned, there is nothing in the contract to limit him from recovering the actual damages sustained over and above the ten thousand dollars. At this time I would like to make this one other point, if the Court please, so that the Court may not misunderstand our position. We claim that so far as the ten thousand dollars is concerned, we don't have to establish actual damages to entitle us to retain the ten thousand dollars under the contract. That was the sum which the plaintiff fixed and agreed should be held if he failed to perform. If the jury finds that he failed to perform without proof of actual damage, [87] we claim to be entitled to retain the ten thousand dollars. If we sustained actual damages, we claim the right to recover such excess over and above the ten thousand dollars as were actually sustained as damages by the defendant in this case, and not exceeding seventy-three hundred dollars in



excess of the ten thousand dollars.

The COURT.—That amount, ten thousand dollars, is to be held in liquidation of damages suffered by the seller if the buyer fails to perform the contract?

Mr. SEABURY.—The object was to absolutely assure the defendant.

The COURT.—I think that the \$10,000 was in full of all liquidated damages and I sustain the objection.

Mr. SEABURY.—We except. For the purpose of hurrying this trial, if your Honor please, may I make an offer to prove the allegations contained in the counterclaim, to which this objection was made, which was what I was about to do. Counsel objects to any evidence under the counterclaim. (To counsel for the plaintiff.) Am I right?

Mr. KNOLLENBERG.—Any evidence in support of the counterclaim.

The COURT.—For the purpose of the record, is that a formal introduction of evidence in support of that?

Mr. SEABURY.—There may be a question as to that, and in view of the undisputed fact that Mr. Knollenberg's objection was to all evidence offered in support of the counterclaim, I prefer to have a record which would protect the defendant in that respect.

The COURT.—All right.

Mr. SEABURY.—We now offer to prove in support of the counterclaim the allegations in the amended answer of the defendant, the allegations contained in that portion of the answer which I understand counsel for the plaintiff objects to upon

the ground that it is inadmissible under the contract which is the subject of the suit.

Mr. KNOLLENBERG.—Upon the ground particularly that the basis of [88] the counterclaim is the written contract, which provides for liquidated damages, and which he admits in paragraph 14 of his amended answer are liquidated damages, and under the admission in paragraph 14 and the contract there can be no recovery for any other damages.

The COURT.—Have you finished?

Mr. SEABURY.—Yes, your Honor.

The COURT.—Sustained.

Mr. SEABURY.—We except.

## XII.

The Court erred in holding and deciding that the amount of damages which the defendant might recover of and from the plaintiff was limited to the sum of Ten Thousand (\$10,000) Dollars, and in holding that such construction of the contract sued upon was affected by the question—At whose suggestion and request the written clauses of the contract sued upon were inserted, and in sustaining plaintiff's objection to the question, as follows:

Q. Will you tell whether or not any of the terms of the contract which appear to be in writing were so made at the suggestion of yourself or Mr. Myers?

Mr. KNOLLENBERG.—We object to the question. It makes no difference at whose suggestion it was made. It was made and the contract speaks for itself. It is agreed to by the parties to the contract and by the pleadings. We are bound by our pleadings. They admit we are bound, and admit that they



are bound, and it would make no difference who made the suggestions.

Mr. SEABURY.—I realize, your Honor, that one of the rules of construction upon which my friend has relied is that the instrument being in the handwriting of the defendant would be more strictly construed against that party. Now, if that is the case, [89] I desire to examine this witness for the purpose of showing that the changes in this contract were made at the suggestion of the other party, namely, Mr. Myers, which would entirely dissipate that burden upon the defendant.

Mr. KNOLLENBERG.—I think that counsel would be right, if he brings that knowledge home to the plaintiff, but if he does not, I think we are bound by what the contract says, regardless of what Mr. Myers and Mr. Kibbey said outside. No verbal agreement made at the time or previous to this contract would vary or affect us in any respect, except, of course, if they made a contemporaneous agreement that would also be a binding contract. That would change it.

Mr. SEABURY.—Of course, we don't wish to show any modification of the agreement, your Honor. The rights of Mr. Hall can be no better than the rights of Mr. Myers, and in view of the rule of construction which has been urged against us, it seems to me we have a right to explain the circumstances under which the clauses were inserted, for the purpose of showing, if possible, that the responsibility and burden for these clauses did not necessarily rest with the defendant.



The COURT.—Well, I think, regardless of who may have written them or at whose suggestion they were incorporated in the contract, that the amount of damages which the defendant might recover was limited to ten thousand dollars. I sustain the objection.

Mr. SEABURY.—I except.

### XIII.

The Court erred in sustaining plaintiff's objection to a question propounded by defendant to its witness Elias for the reasons set forth below, as follows:

Q. What, if anything, was said between you and Mr. Oliver with [90] reference to what, if anything, Mr. Myers was going to do if he was present on these occasions?

Mr. STONEMAN.—We object to the question, if your Honor please, for the reason that it does not appear that what Mr. Myers was going to do was binding upon this plaintiff; that Mr. Myers was acting in any capacity that would bind the plaintiff. For that reason it is incompetent and irrelevant.

Mr. SEABURY.—I direct your Honor's attention to Plaintiff's Exhibit "B," the contract between Mr. Meyers and Mr. Hall, which is as follows: "It is also mutually understood and agreed that the said E. W. Myers or E. M. Tankersley, his agent, shall be on the ground at the time of delivery of all cattle, and aid and assist in receiving said cattle."

Mr. STONEMAN.—That does not change the contract at all in any way. If it is relevant at all, it is a matter personally between ourselves and Myers and Tankersley.

Mr. SEABURY.—We think it relevant, if your Honor please, to show what Mr. Tankersley's position was. It shows that either one of them was to be there and aid and assist Mr. Hall or his assignee in receiving the cattle.

The COURT.—What did you ask?

Mr. SEABURY.—What, if anything, was said about the function to be performed by Myers or Tankersley on receiving these cattle?

The COURT.—The objection is sustained.

Mr. SEABURY.—Exception.

#### XIV.

The Court erred in sustaining plaintiff's objection to a question propounded by defendant to its witness Elias, by which defendant proposed to elicit testimony of a conversation had by said witness in the presence of plaintiff for the reasons set forth below, as follows: [91]

Q. Tell us what took place after you left Nogales to go out there to see these cattle.

A. Nothing that I can remember on the road until we got there. We got the men to gather the herd, and I asked Mr. Hall to go ahead and cut the herd of cattle to satisfy himself. Well, they went in there and looked around for a little while, and then he come out and he says, he started to tell me there was too many unmerchantable cattle, that they weren't cattle according to contract. At that time Mr. Myers was present, and I told Mr. Myers—

Mr. STONEMAN.—We object to any conversation between this witness and Mr. Myers as not binding upon this plaintiff.

Mr. SEABURY.—In the presence of the plaintiff, if your Honor please, with reference to this very matter.

The COURT.—Well, I don't think any statement made by Myers would be binding on this plaintiff.

Mr. SEABURY.—Notwithstanding that Mr. Myers is the assignor of the plaintiff, if your Honor please?

The COURT.—Yes, notwithstanding that fact. After he sold this contract to the plaintiff and the plaintiff had assumed all the burden and was to reap all the benefit. I do not think that any statement made by Mr. Myers would be binding upon the plaintiff, nor do I think that any construction that Mr. Myers may have placed upon the contract would be binding upon the plaintiff.

Mr. SEABURY.—Nor any admissions made by Mr. Myers?

The COURT.—Nor any admissions made by Mr. Myers.

Mr. SEABURY.—The objection is sustained.

The COURT.—Yes, I sustain the objection.

Mr. SEABURY.—May I except. May I also except to your Honor's construction of the matter with reference to any admissions made by Mr. Myers with reference to this matter as not being binding upon plaintiff?

The COURT.—Yes. [92]

Mr. SEABURY.—May I ask whether this contract between Myers and Hall is in evidence—it is, is it not? Plaintiff's Exhibit "B."

Mr. STONEMAN.—Yes.



The COURT.—When I say that any admission made by Mr. Myers should not be received, I mean any admission made by him after the assignment by him to Mr. Hall of the contract in question, not admissions made theretofore.

Mr. SEABURY.—May I still reserve my exception to your Honor's ruling as modified?

The COURT.—Yes.

Mr. SEABURY.—I do not wish to burden your Honor with it, but I wish to direct your Honor's attention to the part of the contract which makes Mr. Myers or Mr. Tankersley agent of Hall for the very purpose of being there at that time.

The COURT.—The plaintiff has not objected to his being there. What they object to is the admission or statements alleged to have been made by Mr. Myers.

## XV.

The Court erred in overruling defendant's objection to the questions propounded to defendant's witness Joffroy by plaintiff upon cross-examination, upon the ground that the said questions and the testimony elicited was incompetent and immaterial to the issues in this case and not proper cross-examination, as follows:

Q. You would not expect people to order cars unless they had a use for them, would you? Now, Mr. Witness, isn't it customary when cars are ordered, and the one who orders them finds that he has no immediate use for them, to cancel that order to save demurrage of a dollar a car?

Mr. SEABURY.—We object to that on the ground

106 *Alamo Cattle Company, Sociedad Anonima*,  
that the proof [93] of custom is not admissible—  
not proper cross-examination.

The COURT.—Objection sustained.

Mr. STONEMAN.—Q. Have you ever known people, anyone else besides Mr. Oliver, to cancel an order for cars because he had no use for them on the day that they were ordered?

The COURT.—I will change my ruling on that because of the fact that the witness stated that it was his duty to know of the cars that were in the yard.

Mr. SEABURY.—But I direct your Honor's attention to the fact that our objection goes to the point that assuming that he has knowledge of the custom, proof of the custom is immaterial and incompetent in this case, because the issue in this case is what Mr. Hall did with reference to this particular shipment, and we claim that proof of custom is incompetent to prove that or disprove that issue.

The COURT.—I will permit him to answer the question.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Q. Isn't it the custom for those who order cars to be used on a certain date to cancel that order and reorder in the event they find that they have no use for the cars as of the date that they are ordered?

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

## XVI.

The Court erred in overruling the defendant's ob-

jection to the question propounded by plaintiff's counsel to defendant's witness Myers on his cross-examination on the grounds stated below, as follows:

Q. And you would not be able to realize on your contract if the cattle were not delivered under this wording of the contract: [94] That the said E. W. Myers is to receive the aforesaid consideration of three dollars a head for the two-year old steers, and four dollars a head for the four year-old steers only in case they are delivered?

Mr. SEABURY.—Now, we object to that, if your Honor please, upon the ground that such testimony requires Mr. Myers to construe as a question of law the effect of the contract between him and Mr. Hall, and upon the ground that it is incompetent and not within the issue of this controversy and not tending to establish any interest of Mr. Myers in this case.

The COURT.—Objection overruled.

A. Yes, sir.

## XVII.

That the evidence was insufficient to justify and support the verdict of the jury, among other things, for the reason that there was no evidence establishing the readiness and ability of the plaintiff to perform his part of the contract after May 9th and before May 12th, 1913; but, on the contrary, the uncontradicted evidence was the sole ability of the plaintiff Hall to perform his part of the contract resulting from his sale of the cattle to Clay, Robinson and Company by and through a representative of Clay, Robinson and Company, namely, the witness Johnston, and that the said Johnston refused to accept



the said cattle on May 9th, from which it follows that on May 12th, 1913, the plaintiff was not ready, willing or able to perform his part of the contract sued upon.

### XVIII.

That the learned Court further erred in denying the motion of the defendant made at the close of the plaintiff's case for a directed verdict in its favor, and also in denying the renewal of said motion duly made by defendant's counsel at the close of all [95] of the evidence, upon the ground that the plaintiff's evidence showed that prior to the commencement of suit and about the 12th of May, 1913, the defendant had made and entered into a valid contract with the plaintiff for the purpose of compromising the dispute which then and there existed between the plaintiff and the defendant, with reference to the contract sued upon herein and for the purpose of superseding and abrogating the contract sued upon, for the reason that such proof constituted a fatal variance with the pleadings in said cause; and upon the ground of said variance and because the plaintiff had proved a cause of action not alleged in the complaint, which was in reality a substitute for the cause of action sued upon, the plaintiff was not entitled to a verdict and defendant was entitled to judgment, directing a verdict in its favor against the plaintiff, to which rulings defendant duly excepted.

### XIX.

The Court erred in declining and refusing to charge the jury as duly requested by defendant in writing, which request was duly submitted to the

Court before the close of the evidence and before the Court charged the jury, as follows:

Defendant's Written Request No. 2.

By its terms it was the duty of the defendant upon receipt of fifteen (15) days' notice to deliver upon cars furnished by the plaintiff at Nogales, Arizona, during the months of April and May, 1913, in train-load lots from four thousand (4,000) to five thousand (5,000) head of two year old and one thousand (1,000) head of four year old steers of a quality as good as or better than Terrazas cattle.

To which ruling defendant duly excepted.

XX.

The Court likewise erred in refusing to give defendant's written request No. 3, so presented to the Court as aforesaid: [96]

Defendant's Written Request No. 3.

But I charge that it was incumbent upon and was the duty of the plaintiff under the contract to give the defendant fifteen (15) days' notice of each delivery; to furnish the cars at Nogales, Arizona, to receive the cattle; and to guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales before each shipment crossed the line, and to make such payment when the cattle were delivered on board of the cars.

To which ruling defendant duly excepted.

XXI.

The Court likewise erred in refusing to give defendant's written request No. 4, so presented to the Court as aforesaid:

Defendant's Written Request No. 4.

I charge you that the duty of the defendant to deliver the specified cattle depended upon prior notice by the plaintiff to the defendant to deliver the cattle to him and upon the willingness and ability of the plaintiff to receive the cattle and to pay for them when they were placed on board of the cars furnished by the plaintiff.

To which ruling defendant duly excepted.

XXII.

The Court likewise erred in refusing to give defendant's written request No. 10 so presented to the Court as aforesaid:

Defendant's Written Request No. 10.

If you find that the defendant is entitled to a verdict and that it sustained actual damage in excess of ten thousand (\$10,000) dollars already received, you will then ascertain and determine what, if any, sum in addition thereto and not exceeding the sum of seven thousand three hundred (\$7,300) dollars in addition, the defendant is entitled to recover from the plaintiff by way of counterclaim. [97]

To which ruling defendant duly excepted.

XXIII.

The Court likewise erred in refusing to give defendant's written request No. 11 so presented to the Court as aforesaid:

Defendant's Written Request No. 11.

In this connection if you find that the plaintiff breached the contract while the defendant was free from fault and ready and willing to perform its part of the contract, you will award to the defendant such



sum not exceeding seven thousand three hundred (\$7,300) dollars in addition to the ten thousand (\$10,000) dollars, as in your judgment will reasonably compensate the defendant for the actual loss and damage, if any were sustained by it, over and above the said ten thousand (\$10,000) dollars by reason of the plaintiff's breach of the contract.

To which ruling defendant duly excepted.

#### XXIV.

The Court likewise erred in refusing to give defendant's written supplemental request No. 1 so presented to the Court as aforesaid:

Defendant's Written Supplemental Request No. 1.

If you find from the evidence that defendant tendered and offered to the plaintiff a herd of cattle in May, 1913, from which the plaintiff could have cut a train-load of two year old steers, as good or better than Terrazas cattle, and that plaintiff refused to receive them, then you must find a verdict for the defendant.

To which ruling defendant duly excepted.

#### XXV.

The Court likewise erred in refusing to give defendant's written supplemental request No. 2, so presented to the Court as aforesaid:

Defendant's Written Supplemental Request No. 2.

[98]

I further charge you that the provision in the contract which required the buyer to give 15 days' notice before the delivery of each shipment was a provision for the benefit of the seller.

To which ruling defendant duly excepted.

XXVI.

The Court likewise erred in refusing to give defendant's written supplemental request No. 3, so presented to the Court as aforesaid:

Defendant's Written Supplemental Request No. 3.

I further charge you that, under the contract, the seller had the right and privilege to tender and offer to the buyer during April or May, 1913, the cattle called for in the contract, in train-load lots, without prior notice and demand from the buyer, and if you find that the defendant did during May, 1913, duly tender such cattle to the plaintiff, and that he refused or failed to accept them, then I charge you that the plaintiff breached the contract, and your verdict must be for the defendant, unless you find that the defendant waived the particular breach in question.

To which ruling defendant duly excepted.

XXVII.

The Court likewise erred in refusing to give defendant's written supplemental request No. 4, as presented to the Court as aforesaid:

Defendant's Written Supplemental Request No. 4.

I further charge you that it was not contemplated by the terms of the contract sued upon, that the plaintiff could require all of the cattle called for under the contract to be delivered in one shipment or at one time. A reasonable construction of the contract entitled the defendant to make deliveries during April and May, in train-load lots, and defendant was not required to [99] deliver all the cattle under the contract in one shipment or at one time, pursuant

to the notice contained in plaintiff's telegram dated May 14th.

To which ruling defendant duly excepted.

XXVIII.

The Court likewise erred in refusing to give defendant's written supplemental request No. 7, so presented to the Court as aforesaid:

Defendant's Written Supplemental Request No. 7.

I further charge you that, even if you find that the cattle tendered to plaintiff, on May 9th or May 12th, or both, were not up to the contract, yet if you believe and find that, prior to those dates or either of them, the plaintiff was not ready willing and able to perform his part of the contract, then you must find for the defendant.

To which ruling defendant duly excepted.

XXIX.

The learned Court further erred in giving, at the request of the plaintiff, over the exception duly taken by the defendant, the plaintiff's written request No. 5, as follows:

Plaintiff's Written Request No. 5.

You are also instructed that the burden of proof is upon the Alamo Cattle Company before they can recover judgment against the plaintiff, to show that the cattle alleged to have been tendered on May 9th and May 12th, 1913, fully complied with the contract in every respect.

And also in giving plaintiff's written request No. 7 as modified by the Court:



114 *Alamo Cattle Company, Sociedad Anonima,*  
Plaintiff's Written Request No. 7 as Modified by the  
Court.

You are instructed that if you believe the cattle tendered on or about May 9th or May 12th did not comply with the contract as far as quality, ages and numbers are concerned, the letter from [100] the defendant dated May 13, 1913, constituted a breach of the contract on the part of the defendant and justified the plaintiff in treating it as violated by the defendant and at an end.

To all of which defendant duly excepted upon the ground that the burden of proof is on the plaintiff to show a breach of the contract by the defendant, and as to said latter charge, upon the ground that said charge is incomplete in that it justifies the plaintiff in treating the contract as at an end without requiring proof on his part that he had performed the conditions of the contract to be by him performed up to the time of the breach of the contract and that he was ready, willing and able to perform the contract on his part.

XXX.

The Court further erred in charging the jury upon its own motion :

You are instructed that under the terms of the contract sued upon, the obligation was imposed upon the defendant to gather and deliver a train-load of cattle complying in all respect as to grade and quality with the requirements of the contract, and plaintiff was under no obligation to examine, inspect or cut from the herd of cattle gathered for delivery by defendant, cattle not up to such requirements. In

other words, the plaintiff is not under the terms of the contract sued upon, required to cut from any herd of cattle gathered, such cattle as there might be in the herd, consisting of runts, stags, cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship, unmerchantable cattle, cattle under two years old, all cattle not of the grade as good or better than Terrazas cattle.

To which defendant duly excepted, upon the ground that such instruction placed an erroneous construction upon the terms and provisions of the contract sued upon, and in effect relieved the plaintiff of the necessity of accepting a train-load [101] of cattle which were in all respects in accordance with the terms of the contract, provided such train-load of cattle could have been cut from the herd of cattle tendered by the defendant to the plaintiff; and upon the further ground that it permitted the jury to find a verdict for the plaintiff even though the jury might have found that there were only a few unmerchantable cattle, unsubstantial in amount in the herd of cattle so tendered to the plaintiff, and relieved the plaintiff of his obligation and duty under such circumstances to point out and designate to the defendant which, if any, of such cattle were claimed by him to have been unmerchantable, and for that reason unacceptable to him under the terms of said contract; and withdrew from the jury the right to find that notwithstanding the presence in the herds so tendered by defendant to plaintiff of one or more cripples or other unmerchantable cattle, that in reality the defendant substantially performed its

contract with the plaintiff by tendering a full train-load lot of good and merchantable cattle under and pursuant to and in strict accordance with the terms of the contract sued upon.

## XXXI.

The Court further erred in instructing the jury as follows:

You are instructed that under the terms of the contract sued upon, the plaintiff was under no obligation to arrange for payment of the cattle to be delivered until and unless the defendant had gathered and offered for delivery in the Republic of Mexico, cattle of the grade and quality required under the terms of the contract and in numbers sufficient to constitute train-load lots, after deducting 15% of contract cattle.

You are instructed that no duty devolved upon the plaintiff in the matter of delivery and acceptance of cattle from the defendant under the terms of the contract sued upon, other than [102] to accept such contract cattle in train-load lots, provide cars for transportation and pay to the defendant the contract price per head upon delivery of the cattle, free of all duties and expenses on board cars at Nogales, Arizona. Unless, therefore, you find from the evidence and believe that the defendant actually gathered contract cattle in train-load lots, ready for delivery on board cars at Nogales, Arizona, plaintiff was under no obligation to arrange for payment therefor in a manner satisfactory to the First National Bank of Nogales, Arizona.

The contract makes the payment of the balance of



the purchase price payable when the cattle are delivered on the cars and I therefore charge you that the ability and readiness of the plaintiff so to pay for the cattle is a condition precedent to the plaintiff's right of recovery in this action, unless you find that defendant refused to comply with the contract on its part before any breach of the contract by the plaintiff, in which event, the plaintiff need not show his readiness and ability to perform the contract.

Gentlemen, I repeat; the contract makes the payment of the balance of the purchase price payable when the cattle are delivered on the cars, and I therefore charge you that the ability and readiness of the plaintiff so to pay for the cattle is a condition precedent to the plaintiff's right of recovery in this action, unless you find that the defendant, the Alamo Cattle Company refused to comply with the contract on its part before any breach of the contract by the plaintiff, in which event the plaintiff need not show his readiness and ability to perform the contract.

You will observe that the contract provides that the buyer was required to give 15 days' notice for each delivery of cattle in train-load lots during the months of April and May, 1913, furnished the cars at Nogales, Arizona, to receive the cattle [103] and to guarantee payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, before each shipment crossed the line and to make such payment when the cattle were delivered on board cars, but under the facts and testimony in this case, it is shown that the cattle variously estimated at from one thousand to

118 *Alamo Cattle Company, Sociedad Anonima,*  
fourteen hundred head and alleged to have been by the defendant tendered to the plaintiff on or about May 9th or May 12th, 1913, under the contract, were not accepted or received by the plaintiff and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material issues in this case. I say it seems to me that they are not. The main issue of fact to be presented to you for your consideration being whether or not the cattle tendered on or about May 9th or May 12th, 1913, were in reality as good as or better than Terrazas cattle, in train-load lots and in the numbers, of the brands, ages, grades, and quality required under the terms of the contract, whether or not the plaintiff was justified in his refusal to take the cattle. I say it seems to me that those issues are the main issues to be submitted to you, for your determination.

I think, gentlemen, I will repeat that under the facts and testimony in this case it is shown that the cattle, variously estimated at from one thousand to fourteen hundred head and alleged to have been tendered by the defendant to the plaintiff on or about May 9th or May 12th, 1913, under the contract, was not accepted or received by the plaintiff and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor



was able to or did guarantee the payment [104] of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material—material issues in this case. The material issue of fact to be presented to you and submitted to you for your consideration, being whether or not the cattle tendered on or about May 9th or May 12th, were in reality as good as or better than Terrazas cattle; whether they were tendered in train-load lots and in the numbers, of the brands, ages, grades and quality required under the terms of the contract—whether or not the plaintiff was justified in his refusal to take the cattle.

If you find from the evidence in this case that defendant tendered and offered cattle to plaintiff in performance of the contract, which were not as good as or better than Terrazas cattle and that the defendant refused to furnish any other cattle under the contract which were as good as or better than Terrazas cattle at the time and in the manner provided for in the contract, then the defendant broke the contract and the plaintiff is entitled to a verdict, regardless of whether the plaintiff was able to and did furnish cars at Nogales to receive cattle and regardless of the fact, if it be a fact, that payment for any cattle referred to in the contract had not been guaranteed in a manner satisfactory to the First National Bank at Nogales, Arizona. On the other hand, if you find that the defendant tendered and offered to the plaintiff the cattle called for in the contract, in



the quantity and of the ages specified and that such cattle were as good as or better than Terrazas cattle, then your verdict must be for the defendant.

Therefore, it seems to me, as I said before, but will now repeat and explain, that if there was a breach, if either party breached the contract on or about May 9th or May 12th, [105] 1913, then it is not material to inquire whether or not the defendant, the Alamo Cattle Company, loaded the cattle on cars at Nogales, nor is it material to inquire whether or not the plaintiff had made financial arrangements satisfactory to the Bank at Nogales or had made satisfactory arrangements to have on hand cars to receive these cattle. In other words, it seems to me that they had not reached those points,—they had gotten to the point where the contract was breached by one party or the other before the time arrived for the plaintiff to make these financial arrangements or these arrangements for cars or for the defendant to deliver the cattle on board the cars at Nogales, Arizona. In other words, it was the duty of the defendant upon receipt of 15 days' notice of each delivery in train-load lots during the month of April and up to and including May 12th, 1913, to gather and deliver f. o. b., cars at Nogales Station, all duties and expenses paid, the cattle called for under the terms of the contract, and if the defendant did, on or about May 9th or 12th, 1913, tender and offer to plaintiff a train-load lot of the said cattle, in the numbers and of the ages, brands, grades and quality required under the terms of the contract and if the plaintiff declined or refused to receive same, then it is not

necessary in this case that the defendant should go further and show that the cattle were delivered f. o. b. cars at Nogales Station, all duties and expenses paid.

On the other hand, if you believe from the testimony that the cattle so tendered by the defendant to the plaintiff at the time above mentioned, were not in the numbers, of the ages, brands, grades and quality required by the terms of the contract, then the plaintiff was under no obligation as to that particular lot of cattle, to receive same or furnish cars therefor, or to guarantee payment therefor in a manner satisfactory to the First National Bank of Nogales.

To all of which the defendant duly excepted on the ground [106] that such instructions withdraw from the consideration of the jury, the question of whether the plaintiff was in reality willing and able to perform the contract upon his part prior to any breach of the contract upon the part of the defendant, which question is a question of fact for the jury to decide.

### XXXII.

The Court erred in overruling defendant's motion for a new trial for the reasons averred above in the more specific assignment of errors herein contained.

WHEREFORE, the defendant prays that for said manifest errors the judgment of the Court should be reversed.

FRANK J. BARRY,

WILLIAM M. SEABURY,

Attorneys for Defendant.

[Endorsements]: No. 10 (Tucson). In the United States District Court for the District of Arizona.

122 *Alamo Cattle Company, Sociedad Anonima,*  
John G. Hall, Plaintiff, vs. Alamo Cattle Company,  
Sociedad Anonima, Defendant. Assignment of Er-  
rors. Filed June 24, A. D. 1914. George W. Lewis,  
Clerk. By Effie D. Botts, Deputy Clerk. [107]

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*In the District Court of the United States for the  
District of Arizona.*

O.K.—GJS.

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

**Bond.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, the Alamo Cattle Company, Sociedad Anonima, as principal, and L. J. F. Iaeger and Fred Rondstadt, as sureties, are held and firmly bound unto John G. Hall, defendant in error, in the full sum of One Thousand Dollars, the sum being the amount of the bond fixed by the District Court of the United States for the District of Arizona by order duly entered on the records of said court on June 24, 1914, to be paid to the said John G. Hall, defendant in error, his heirs, legal representatives or assigns, to which payment well and truly to be made, we bind ourselves, and our and each of our successors, heirs, executors, administrators, legal representatives, jointly and severally by these presents.



Sealed with our seals and dated this 25th day of June, in the year of our Lord one thousand nine hundred and fourteen.

WHEREAS, on the 29th day of May, 1914, at the District Court of the United States for the District of Arizona, in a suit pending in said court between John G. Hall, plaintiff, and the Alamo Cattle Company, Sociedad Anonima, defendant, a judgment was rendered in favor of the plaintiff and against the said Alamo Cattle Company, Sociedad Anonima, for the sum of Twenty-one Thousand Two Hundred Twenty-five Dollars and costs of action, and the said Alamo Cattle Company, Sociedad Anonima, has obtained a writ of error to reverse said judgment in the aforesaid action and filed a copy thereof in the clerk's office of said court, and a citation directed to the said John G. Hall, plaintiff, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth [108] Circuit, to be holden at San Francisco, State of California;

Now, the condition of the above obligation is such that if the said Alamo Cattle Company, Sociedad Anonima, shall prosecute its said writ of error to effect and answer all costs if it fail to make said plea good, then the above obligation to be void, else to remain in full force and effect, and the said sureties agree that in case of a breach of any condition hereof said Court may, upon notice to them of not less than ten days, proceed summarily in this action to ascertain the amount which said sureties are bound to pay on account of such breach and render judgment

124 *Alamo Cattle Company, Sociedad Anonima*,  
therefor against them and award execution there-  
for.

ALAMO CATTLE COMPANY, SOCIEDAD  
ANONIMA.

By W. BECKFORD KIBBEY, Jr.,  
President.

L. J. F. IAEGER.

FRED RONDSTADT.

The above and foregoing bond approved this 25th  
day of June, 1914.

GEORGE W. LEWIS,  
Clerk.

By Effie D. Botts,  
Deputy Clerk. [109]

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*In the District Court of the United States for the  
District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

**Justification of Surety.**

State of Arizona,  
County of Pima,—ss.

I, L. J. F. Iaeger, being duly sworn, say that I re-  
side at Tucson, in the County of Pima, State of  
Arizona, and am over the age of twenty-one years;  
that I desire to act as one of the sureties of the  
Alamo Cattle Company, Sociedad Anonima, on the  
One Thousand Dollar (\$1,000) appeal bond to be

executed by said company and two sureties herein; that I am worth, over and above all debts due by me and free and clear of all incumbrances of whatsoever nature, more than the sum of One Thousand Dollars.

L. J. F. IAGER.

Sworn to before me this 25th day of June, 1914.

[Seal]

GEORGE W. LEWIS,

Clerk.

By Effie D. Botts,

Deputy Clerk. [110]

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*In the District Court of the United States for the  
District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

**Justification of Surety.**

State of Arizona,  
County of Pima,—ss.

I, Fred Rondstadt, being duly sworn, say that I reside at Tucson, in the County of Pima, State of Arizona, and am over the age of twenty-one years; that I desire to act as one of the sureties of the Alamo Cattle Company, Sociedad Anonima, on the One Thousand Dollar (\$1,000) appeal bond to be executed by said company and two sureties herein; that I am worth, over and above all debts due by me and



126 *Alamo Cattle Company, Sociedad Anonima*,  
free and clear of all incumbrances of whatsoever nature,  
more than the sum of One Thousand Dollars.

FRED RONSTADT.

Sworn to before me this 25th day of June, 1914.

[Seal]

GEORGE W. LEWIS,

Clerk.

By Effie D. Botts,

Deputy Clerk.

[Endorsements]: No. 10 (Tucson). In the District Court of the United States for the District of Arizona. John G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defendant. Bond. Filed June 25, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [111]

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*In the United States District Court for the District  
of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

**Order [Extending Time to File Bill of Exceptions].**

It appearing by the stipulation attached hereto, dated June 26th, 1914, signed by the attorneys for the plaintiff and the defendant, that the consent of the plaintiff has been obtained for the entrance of this Order;

It is hereby ordered, that the time in which the defendant may file its Bill of Exceptions in the

above-entitled cause is extended to and including the 15th day of July, 1914.

Dated Tucson, Arizona, June 27th, 1914.

WM. H. SAWTELLE,  
Judge.

*In the District Court of the United States in and for  
the District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

**Stipulation [for Extension of Time to File Bill of  
Exceptions].**

It is hereby stipulated and agreed that the defendant's time in which to file its proposed bill of exceptions in the above-entitled cause be, and the same hereby is, extended to and including July 15, 1914.

It is further stipulated and agreed that an order to this effect may be entered herein without further notice to the parties, and that defendant above named have the same right to make said motion for a new trial and file said bill of exceptions within the time herein stated with the same force and effect as though said matters had been done and performed

128 *Alamo Cattle Company, Sociedad Anonima,*  
in the present term of the District Court of the  
United States.

LOOMIS & KNOLLENBERG,  
STONEMAN & LING,

Attorneys for Plaintiff.

FRANK J. BARRY,  
WILLIAM M. SEABURY.

Attorneys for Defendant.

Dated June 26th, 1914.

[Endorsements]: No. 10 (Tucson). In the United  
States District Court for the District of Arizona.  
John G. Hall, Plaintiff, vs. Alamo Cattle Company,  
Sociedad Anonima, Defendant. Order and Stipu-  
lation. Filed June 27th, A. D. 1914. George W.  
Lewis, Clerk. By Effie D. Botts, Deputy Clerk.  
[111½]

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*In the United States District Court for the District  
of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED that on the 22d day of  
May, A. D. 1914, at a regular and stated term of the  
United States District Court for the District of  
Arizona, before the Honorable William H. Sawtelle,  
Judge of the above-entitled court, the issues joined  
by the pleadings in said cause came on to be tried



by said Judge and a jury impanelled and sworn to try the issues in said cause.

Plaintiff was represented by Messrs. Stoneman and Ling and Messrs. Loomis and Knollenberg, his attorneys, and the defendant was represented by Mr. William M. Seabury and Mr. Frank J. Barry, its attorneys.

The complaint and answer being read to the jury by counsel, thereupon the following further proceedings were had herein, to wit:

On motion of plaintiff's counsel and without objection the complaint was amended upon order of the Court by substituting the word "train-load" for the word "carload" in paragraph 6, page 6, line No. 33 of the complaint, and by inserting the words "and did comply" after the word "with" in paragraph 6, page 6, line 9 of the complaint.

Mr. STONEMAN.—We offer in evidence the original of the contract sued upon, which is admitted to be the contract by the answer [112] and ask that it be marked Plaintiff's Exhibit "A."

No objection made.

The COURT.—It may be received and marked admitted.

[**Testimony of John G. Hall, in His Own Behalf.**]

JOHN G. HALL, called as a witness in his own behalf, having been duly sworn, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

I am the plaintiff, John G. Hall, and am acquainted with Ed. W. Myers, and with the terms of Plaintiff's Exhibit "A." I purchased the contract described

(Testimony of John G. Hall.)

in said Exhibit "A" from Myers and assumed the obligation of carrying out that part of the contract in so far as it related to Myers. The assignment was in writing.

Q. I hand you what purports to be a written assignment of that contract and ask you whether or not that is the assignment which you refer to being made in writing. A. Yes, sir, it is.

Q. Are you acquainted with the signature of E. W. Myers? A. Well, I can't say that I am.

Q. Are you acquainted with the signature of K. D. Oliver? A. Yes, sir.

Mr. STONEMAN.—We offer in evidence and ask that it be marked Plaintiff's Exhibit "B," assignment which was presented to the witness.

Mr. SEABURY.—On counsel's statement that there is a copy of that attached to the complaint, we have no objection.

The COURT.—It may be received and marked Plaintiff's Exhibit "B."

The first steps taken under the contract were that the Alamo Cattle Company first notified us by letter that they would have these cattle ready at a certain date, and we notified them by letter we would be there to receive them.

Mr. K. D. Oliver was my agent for the purpose of dealing with the Alamo Cattle Company with respect to these [113] cattle.

Q. I'll ask you if you received from the Alamo Cattle Company a letter purporting to have been written by W. Beckford Kibbey, dated April 25th,

(Testimony of John G. Hall.)

which I now hand you.      A. Yes, sir.

Mr. STONEMAN.—We offer it in evidence and ask that it be marked Plaintiff's Exhibit "C," the letter just handed to the witness.

Mr. SEABURY.—No objection.

Received and marked Plaintiff's Exhibit "C."

Q. Did you reply to that letter, Mr. Hall?

A. Yes, sir.

Mr. STONEMAN.—I ask counsel on the other side if they have the original of a letter written April 28th, 1913, addressed to W. Beckford Kibbey, Jr., First National Bank, signed by K. D. Oliver, Manager.

Mr. SEABURY.—I'll raise no objection to the copy as secondary evidence, Mr. Stoneman.

Mr. STONEMAN.—Upon the stipulation of counsel, we now offer in evidence copy of letter, the original of which was signed by K. D. Oliver as manager, dated on the 28th of April, 1913, addressed to W. Beckford Kibbey, Jr., and ask that it be marked Plaintiff's Exhibit "D."

Received and marked Plaintiff's Exhibit "D."

Mr. STONEMAN.—If your Honor please, at this time I ask leave to read these letters to the jury.

The COURT.—You may do so.

(Mr. Stoneman reads exhibits to jury.)

Mr. STONEMAN.—I ask counsel for defendant if you have in your possession original of telegram purporting to have been sent from El Paso, Texas, on May 3d, 1913, addressed to the Alamo Cattle Co., First National Bank, Nogales, Arizona, signed K. D. Oliver.



132 *Alamo Cattle Company, Sociedad Anonima,*  
(Testimony of John G. Hall.)

Mr. SEABURY.—No objection. [114]

Mr. STONEMAN.—By stipulation of counsel, I offer in evidence and ask that it be marked Plaintiff's Exhibit "E," carbon copy of telegram of May 3d, 1913, which I understand is admitted by counsel to have been received by the addressee at Nogales.

Mr. SEABURY.—Yes.

The COURT.—It may be received.

Mr. STONEMAN.—Under the same stipulation, I offer in evidence and ask that it be marked Plaintiff's Exhibit "F," a telegram addressed to K. D. Oliver, El Paso, Texas, signed by Alamo Cattle Company, dated May 3d, which under the stipulation, I understand, was sent by the Alamo Cattle Company and received by K. D. Oliver.

Mr. SEABURY.—That is correct.

The COURT.—It may be admitted.

(Mr. Stoneman reads exhibits to jury.)

Mr. STONEMAN.—By stipulation of counsel, we offer in evidence and ask that it be marked by proper designation copy of telegram dated May 4th, El Paso, addressed to Alamo Cattle Company, signed K. D. Oliver, under stipulation that it was sent by K. D. Oliver, and received by defendant in due course.

Mr. SEABURY.—May I ask, if your Honor please, if counsel will extend the same courtesy to us? Under proofs on similar character.

Mr. STONEMAN.—Assuredly. Unless in the event we have the original.

(Testimony of John G. Hall.)

Received and marked Plaintiff's Exhibit "G."

Mr. STONEMAN.—Under the same stipulation, we offer in evidence copy of telegram dated May 5th, 1913, addressed to K. D. Oliver, El Paso, Texas, signed Alamo Cattle Company, under agreement that it was sent by the Alamo Cattle Company and received by K. D. Oliver.

Received and marked Plaintiff's Exhibit "H."

(Mr. Stoneman reads exhibits to jury.) [115]

Mr. STONEMAN.—We offer in evidence the original of a telegram dated Nogales, May 7th, 1913, addressed to K. D. Oliver, El Paso, Texas, signed Alamo Cattle Company, by stipulation of counsel that the telegram was sent by the Alamo Cattle Company, and received by K. D. Oliver in due course.

Received and marked Plaintiff's Exhibit "I."

Mr. STONEMAN.—And also under the same stipulation as to the sending and receipt we offer and ask that it be marked Plaintiff's Exhibit "J," a copy of telegram dated El Paso, May 8th, 1913, addressed to Alamo Cattle Company, signed K. D. Oliver.

Received and marked Plaintiff's Exhibit "J."

(Mr. Stoneman reads exhibits to jury.)

(Recess until Tuesday, May 26th, at 10:00 A. M.)

Be it further remembered that thereupon the plaintiff introduced the following evidence in said case, that is to say:

Tuesday, May 26, 1914.

At 10:00 A. M. this day both parties being present, the plaintiff in person and by his counsel and



(Testimony of John G. Hall.)

the defendant by its counsel, the jurors returned into court and thereupon the following further proceedings were had herein, to wit:

JOHN G. HALL, recalled as a witness in his own behalf, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

I am a citizen and resident of the State of Colorado, and was such when this suit was filed. I first saw the cattle which were to be delivered under this contract about May 13th, when I went out from Nogales in company with Mr. Oliver, Mr. Gillespie, and Ramon Elias to look at a bunch of cattle, which they claimed they were tendering me under the contract. I think there were about 1100 in the bunch. I didn't count them myself, [116] but they represented to me that they had about 1100 in the bunch. I have been familiar with the grade of cattle known as the Terrasas brand for the last fifteen years. They are a fair grade of Mexican cattle and are acknowledged by dealers over the country generally as a standard by which Mexican cattle are judged or compared with. They are to a certain extent bred up. Principally I think with short-horn bulls purchased from the Corralitos herd and the Forman herds in Chihuahua. That bunch of cattle was not as good as the Terrasas cattle by several dollars per head. They were not as large, not as well grown, not as uniform, not as heavy-boned as Terrasas cattle. I did not examine those cattle for brands at that



(Testimony of John G. Hall.)

time. I can't say that I paid much attention to brands. It was the quality of the cattle that interested me more than the brands did. I was looking for the quality of the cattle more than anything else. I had a conversation with Mr. Elias at that time while we were in the herd; we were in the herd on horseback. I think, I am pretty sure that Mr. Oliver was within hearing distance when the conversation occurred, but I wouldn't be positive about that. When I first got to the herd, I asked him what he was doing with so many yearlings in the herd. He said that they were sold to another party, and that whatever I cut out there that I didn't want, he was going to turn over to this other man, and I called his attention to the fact that the herd was nearly half yearlings, and that if I did go to work to trim on the cattle—I asked him why he didn't have his cattle that he was tendering me on the contract trimmed out where I could look at them, without having them mixed up with the other cattle, and he said they hadn't had time to do that after I had gotten out there, and I asked him to do it, and he demurred a little bit, and Mr. Myers was present, also, and Mr. Myers asked me if I wouldn't go in and cut out what I could use of the cattle. So they gave us some horses, and Mr. [117] Oliver and I went in and cut out 35 or 40 head of these cattle such as we could accept under the contract, and Ramon, Mr. Elias, came in and stopped us. He says, "If that's the kind of cattle you want," he says, "we haven't got them here." I says, "I know you

(Testimony of John G. Hall.)

haven't got them." I said, "I told you that on the first start that there wouldn't be over not to exceed 450 to 500 head of cattle that would be two years old after yearlings, stags, cripples, and bulls, cattle that were sore-footed and too thin and *in condition* to ship, were cut out, and we couldn't accept them except in train-loads.

Q. How long have you been in the cattle business, Mr. Hall? A. Since 1879.

Q. What, if anything, did Mr. Elias say with reference to the cattle which at that time you testified you pointed out to him as not being as good or better than Terrasas cattle?

A. He said he had never seen the Terrasas cattle, and wasn't in position to know.

Mr. SEABURY.—I don't understand that he has so testified, your Honor. I think that counsel ought to ask the witness what the conversation was fully without leading him particularly to special items in the alleged conversation. He started to give the conversation, and I thought he had given it all. If he has not, I think he should be requested to state it all, instead of some portion of it.

Mr. STONEMAN.—If your Honor please, I don't understand the objection is interposed upon any known ground that would permit of the Court considering it.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

When they asked me to cut out such cattle as I would receive, I cut out about thirty-five or forty



(Testimony of John G. Hall.)

head to a little bunch, and, "Now," I says, "I don't consider those cattle as good as Terrasas cattle, and besides that, these I have cut out are not all two years old," and I went back again and cut back some seven or eight [118] head of them which were not two years old. We examined them, and I found that they were not two years old, and looked at their mouths. After I had cut out these 35 or 40 head, Ramon came in and told me it was no use going any further, that he couldn't get a train-load of cattle out of there of that kind I was cutting. I said, "I know that," and I says, "What do you want to do about it?" "Well," he says, "I don't know what to do." He says, "I can't give you an answer until we go back to town and see Mr. Kibbey." We discussed the matter with Mr. Kibbey after we got back to town. We had considerable controversy over the matter and parleyed back and forth and tried to make some compromise of the deal. Mr. Kibbey offered to retain \$4,000 of my advance money and return me \$6,000, provided I would wait 30 or 60 days for the \$6,000. This I refused. Finally I made him a proposition. The reason he gave me for asking the time on this payment was that he didn't have the money on hand to pay me. Then I made him another proposition, that if he would deliver me a thousand head of four year old steers in the fall, and give me a contract to that effect at \$32 a head, and give me a contract, and give me a receipt for \$10,000 paid on the new deal, that I would call the deal off and he agreed to do it.



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(Testimony of John G. Hall.)

Mr. SEABURY.—We move to strike out “that he agreed to do it” and that the witness be required to state what he said.

The COURT.—That objection is sustained. That statement “that he agreed to do it.” That is a conclusion.

Q. What did he say? You say he agreed to do it. The Court has ruled that that is a conclusion. What did he say?

A. He said that would be satisfactory to him, or words to that effect. We received a letter or telegram on or about May 13th, from the Alamo Cattle Company with reference to this contract.

Q. I hand you a letter dated May 13th, postmarked Nogales, addressed to you, purporting to be signed by the Alamo Cattle Company [119] by W. Beckford Kibbey, Jr., and ask you if you received that letter.

A. Yes.

Mr. STONEMAN.—We offer in evidence, if the Court please, this letter and ask that it be marked Plaintiff’s Exhibit by proper designation.

Mr. SEABURY.—No objection.

Received in evidence and marked Plaintiff’s Exhibit “K.”

Exhibit read to jury.

Q. I ask you if you sent a telegram to the Alamo Cattle Company under date of May 14th, 1913, in words and figures as shown by this carbon copy of the purported telegram.

A. Yes, sir, I did.

Mr. STONEMAN.—We offer in evidence a carbon copy of telegram as described to the witness and ask,

(Testimony of John G. Hall.)

under the stipulation of counsel to the effect that it was sent and received by the defendant in due course, that it be admitted.

Mr. SEABURY.—We admit the receipt and sending of the telegram.

Received in evidence and marked Plaintiff's Exhibit "L."

Exhibit read to jury.

I think I received an answer to that telegram from the Alamo Cattle Company; I am not positive about it. The Alamo Cattle Company did not deliver to me any cattle of the grade, character, quality and in the numbers required under the contract in response to that telegram. They didn't tender me any.

Q. Did the Alamo Cattle Company at any time tender or offer to you cattle as good or better than Terrasas cattle, which after cutting runts, stags, cripples, lump-jaws, sway-backs, blinds and unmerchable cattle, would permit a train-load to be made after deducting therefrom a cutting of fifteen per cent?

Mr. SEABURY.—We desire to object to that upon the ground that the question is improper in form—assumes fact not offered in evidence, for instance, of what a train-load consists with respect to cattle; also upon the ground that there is no evidence that [120] the plaintiff exercised the privilege of cutting, so that it is impossible to determine whether the cattle came up to the required standard after he exercised that privilege.

The COURT.—Objection overruled.

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Mr. SEABURY.—Except.

The COURT.—Answer the question.

A. They did not. The number to a car that cattle of the size and quality as good as or better than Terrasas cattle would load would depend on the size of the car. An ordinary forty-foot Santa Fe car, they would load fifty to the car without crowding. In a thirty-six foot car they would load about forty-four or forty-five head. Fifteen cars are ordinarily considered on the railroad going into Nogales as a train-load of thirty-six or forty-foot cattle cars. That is the ordinary train-load. That is the number of cars of those dimensions which are considered by cattle shippers and cattle buyers in that vicinity as constituting a train-load. That would make, then, somewhere between 650 and 750 head of cattle to an ordinary train-load. Depending on the length of the cars.

Q. On the 11th day of May, 1913, did you send E. W. Meyers a telegram in words and figures as shown by the carbon copy of the purported telegram I now hand you? A. Yes, sir.

Mr. STONEMAN.—We offer this telegram—the carbon copy—and ask that it be permitted to be read under the stipulation heretofore obtained.

Mr. SEABURY.—We object, if your Honor please, to the offer upon the ground that it is incompetent for the reason that it purports to be a statement from Hall in the nature of a self-serving declaration, addressed to E. W. Meyers, and not the defendant, and, as such, not binding upon the defendant.



(Testimony of John G. Hall.)

(Telegram submitted to the Court.)

The COURT.—Until proof to sustain its relevancy, I sustain the [121] objection.

Mr. STONEMAN.—I ask that this be marked for identification as Plaintiff's Exhibit "N."

The COURT.—Mark it for identification.

(Telegram sent to E. W. Meyers, dated May 11th, 1913, marked Plaintiff's Exhibit "N" for identification.)

(By Mr. STONEMAN.)

Q. On May 11th, 1913, did you send a telegram to the Alamo Cattle Company in words and figures shown by the carbon copy of a telegram purported to be sent to the defendant, signed by you?

A. Yes, sir.

Mr. STONEMAN.—We offer in evidence this copy and ask that it be permitted to be read and marked as plaintiff's exhibit under the same stipulation.

Mr. SEABURY.—All right. We make no objection to its receipt.

Mr. STONEMAN.—(Reads to the jury telegram dated at El Paso, Texas, May 11th, 1913, addressed to Alamo Cattle Company, Nogales, Arizona, and signed J. G. Hall, which is received as Plaintiff's Exhibit "O.")

Q. Now, Mr. Hall, with reference to your ability to pay for these cattle in the event the contract cattle, or cattle called for and up to the amount called for in the contract have been tendered to you, were you or were you not at that time ready, willing and able to pay for a train-load of cattle?

(Testimony of John G. Hall.)

Mr. SEABURY.—We object to that, if your Honor please. We think that the question as put calls for the conclusion of the witness upon a matter which is not expert in nature, and that the witness should be required to state what, if any, financial ability he had at that time to take up the contract—not his mere conclusion that he was able to pay one hundred and twenty thousand dollars, but the fact that he was able to do so.

The COURT.—Overruled. [122]

Mr. SEABURY.—I except.

A. I was prepared and ready to receive and pay for all the cattle that they could deliver to me under the contract. I had had no preliminary conversations with the First National Bank of Nogales with reference to the manner of making the payments by me. After cattle up to the contract had been delivered to me at Nogales on board cars, all duties and expenses paid by the Alamo Cattle Company, I was ready and able to make arrangements for payment for those cattle, in train-load lots, most absolutely. As an evidence of my readiness and ability to make these payments, I state that these cattle were re-sold to Clay Robinson and Company of Denver, and they agreed to pay for the cattle through the El Paso Bank and Trust Company, and I was to check on the El Paso Bank and Trust Company, and all I had to do when the Alamo Cattle Company notified me that they had these cattle ready to cross the line was to have the First National Bank at Nogales wire the El Paso Bank and Trust Company for so much

(Testimony of John G. Hall.)

money, and they were prepared to guarantee the payment for each shipment as it showed up. We had already sold four thousand head of the two year old steers, which were under the contract with the Alamo Cattle Company. We had received eight thousand dollars under our contract with Clay Robinson and Company. I have not got that eight thousand dollars. I turned it back to Clay Robinson and Company.

Cross-examination.

(By Mr. SEABURY.)

I received the eight thousand dollars from Clay Robinson and Company, I think, somewheres about the 20th of March.

I paid it back during the summer and fall. Some I did not pay back until fall. Every cent of it is now paid back. It is not a fact that when I sold these cattle I sold the contract. I did not sell all the cattle to come under this contract from Meyers. [123] only the two year old steers. I sold the cattle at a profit of about two dollars a head—a little less than two dollars a head. James A. Johnson was the representative of Clay Robinson with whom I dealt. Mr. Oliver handled the deal, and he went with Mr. Johnson when he went to see these cattle. Mr. Oliver acted as my agent, and I could not say positively whether he showed Mr. Johnson the contract between Meyers and myself—Plaintiff's Exhibit "B"—but he was familiar with its terms. He also knew the contents of Plaintiff's Exhibit "A," the contract between the defendants and Meyers. He knew them



both, before he made this purchase from me.

It is a fact that Mr. Johnson saw the cattle at the ranches of the Alamo Cattle Company in northern Sonora, Mexico, long prior to May 14th. I was not present. He did not see them in May of 1913, when I was present. I was not there at any time when he was there. May 13th was the first time I saw these cattle that were offered to me.

Q. Whereabouts did you see them?

A. I saw them down at the ranch which Mr. Ramon Elias runs—I don't know what he calls it. About nine or ten miles from Nogales. The cattle were purchased by Mr. Johnson from me to supply an order for one of their customers. Clay Robinson and Company are commission merchants and dealers in cattle. I was financially able to take up this contract. They had never asked me to make an arrangement to pay the balance of the purchase price.

I had never made any arrangements with the First National Bank for that purpose. I don't know whether Mr. Oliver had or not. I was not handling the deal up to the time I went out there. The whole transaction was conducted by Mr. Oliver on my behalf. He was my authorized agent to do anything he wanted with reference to that transaction. I mean he had my full authority to represent me. When I was at the ranch of the defendant about May 13th, [124] 1913, I made objection to Mr. Elias, Mr. Oliver and Mr. Meyers that the cattle shown me were not as good as or better than the Terrasas cattle. I do not remember making it to anybody else. I

(Testimony of John G. Hall.)

made no financial arrangements besides those stated, which involved the El Paso Bank and Trust Company. It is a fact that my only ability to take up this contract depended on those arrangements.

I should judge that there were in that lot of cattle that I saw on the 15th of May, 1913, about eleven thousand head—I did not count them. Probably thirty-five per cent of them were as good as or better than Terrasas cattle. Well, I won't say that they were as good, but they were so nearly as good that I would have accepted them. The balance of the herd consisted of yearlings, stags and bulls, and cattle that were not in condition to ship—sore-footed, poor, looked like they had been on the trail for a week or ten days and were worn out. Under the contract I had the privilege of cutting out fifteen per cent after all of the unmerchantable cattle had been trimmed out by the sellers. I never exercised that privilege, because the herd was never put up in satisfactory shape, and it was for them to do their work first. The herd was not put in the shape that it should have been in under the contract. I mean that it consisted of forty per cent yearlings—fully forty per cent were yearling steers, which I called Mr. Elias' attention to, and he said, "Very well, we are going to ship them to someone else." I said, "I am not going to trim your herd for you." Mr. Elias was present at that time. I told Mr. Elias that the herd was mostly yearlings. Mr. Meyers asked me, after I called his attention to it, to go in and cut out such cattle as I would take, and we cut out thirty-five or forty head.



I pointed out one steer to Mr. Meyers and objected to it upon the ground that it was a yearling. Mr. Meyers was ready to bet a certain sum of [125] money that it was a two year old. Then in my presence he threw that steer, and we both mouthed him, and Mr. Meyers showed me that it was a two year old. I cut back seven or eight more, and he would not bet as to those, and I said I was ready to take that class of cattle under the circumstances. I was ready to take those cattle, if they were growthy, if they showed two years. On this particular steer I made a bet with Meyers that it would not show a two year old mouth, and might have made a half dozen more and won some of them. There is no man who can tell a two year old steer without looking at its mouth. Any man is liable to make a mistake on one particular steer. I think that thirty-five per cent would be the extreme limit of the cattle under the contract in that herd after the yearlings and runts and lame ones, and fifteen per cent of the *balance trimmed* out. I arrived at that figure by looking over the herd. It is a pretty good guess. I am accustomed to looking at cattle in that way. I was ready and willing to take the cattle under contract up to June 1st. That is the limit of the contract. I expected to ship the cattle immediately at any time that they could put them on board cars for me.

It is a fact that I intended to ship the cattle which I received from the defendant on the cars which I was to supply to them. I still say that up to the 13th of May I was anxious to take those cattle. On the



(Testimony of John G. Hall.)

9th of May, four days before I say I was anxious to take these cattle, I notified the Southern Pacific Railroad Company to cancel my order for cars. That was for cattle that were to be delivered previous to that time—that Mr. Oliver and Mr. Johnson were to receive, and they did not have a train-load. I could not say that that was the cancellation of cars which were to be used by me for the shipment of the bunch of cattle of May 13th under the Alamo Cattle Company contract. I cannot testify to that because I was not there on the 9th. I don't know [126] what was done. Whatever was done at that time was done by Mr. Oliver. We had an order in with the Southern Pacific—a blanket order for something like one hundred cars to be used to protect the shipment of these cattle purchased from the Alamo Cattle Company. I had no other cattle contract at that time in Nogales. And the only cars I ordered were ordered by me to receive the cattle from the Alamo people under my contract.

Q. I ask you to look at a telegram which purports to be signed by W. D. Oliver and addressed to the agent of the Southern Pacific railroad, and dated May 9th. I ask you whether you ever knew of that telegram before it was sent.

A. No, sir; I did not. That was sent from Tucson and I was not here.

Q. Do you recognize the substance of the telegram?

A. Yes, sir.

Q. Do you admit that the telegram was sent by

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(Testimony of John G. Hall.)

Oliver and received by the company? A. Yes, sir.

Mr. SEABURY.—We desire to offer that.

Mr. SEABURY.—We offer in evidence, if your Honor please, what purports to be a night letter from Mr. K. D. Oliver, from Tucson, Arizona, and dated May 9, 1913. I have there, if your Honor please, the file of the Southern Pacific Railroad Company.

The COURT.—It will be admitted, with the privilege of withdrawal by substituting a copy thereof.

Mr. SEABURY.—I desire to read it. I claim that it is a part of the correspondence already offered.

Mr. STONEMAN.—No objection.

Mr. SEABURY.—I would like the stenographer to take this exhibit, Defendant's Exhibit No. 1, as follows: (Reads:) "Night letter. Tucson, Arizona, May 9, 1913. Agent, Southern Pacific Company, Nogales, Arizona. Refer our file No. 2. Car order for thirty-two Santa Fe stock, load your station tomorrow; please cancel, as cattle not ready. Writing you from El Paso. (Signed) K. D. Oliver."  
[127]

Q. Now, Mr. Hall, I ask you to look at a letter purporting to be on your stationery, dated from El Paso, May 24, 1913, and signed J. G. Hall by P. B. Dickson, and ask you whether that letter was authorized to be sent by you.

A. (After examining letter.) I could not say whether I authorized that letter to be sent or not, but presume probably I did, because it is dated after we

(Testimony of John G. Hall.)

got notice from the Alamo Cattle Company that they positively refused to deliver us any more cattle. I didn't want to hold the cars there under demurrage. I think that probably the letter was sent by my authorized representative, though I don't recollect the circumstances clearly.

Mr. SEABURY.—We offer it in evidence.

Mr. SEABURY.—I desire to read Defendant's Exhibit No. 2.

(Reads letter marked "Defendant's Exhibit No. 2.")

I don't know that there was any settled time for notice to the Southern Pacific Railway Company to supply cars, provided I always gave them such notice as I could. After making a purchase of such a bunch of cattle as this, I would give them all the notice I could, and depending on circumstances. Sometimes I could get cars on two or three days' notice, but you can't rely on that. No; at some times it would be safe; at others it would not. In my judgment, it was safe to rely on it on May 13, 1913, because there were lots of cars stored there at Nogales at that time. In fact, they were stored there under my own order. After I cancelled the order on May 9th, I claim that, notwithstanding my duty to supply the cars, that I was still ready on May 13th to take the cattle.

Q. I show you a letter dated April 28, 1913, which purports to be on your stationery, and signed K. D. Oliver, and ask you whether or not that was written



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(Testimony of John G. Hall.)

on your paper, with your authority, by your agent,  
Mr. Oliver.

A. (After examining paper.) Just repeat the  
question, Mr. Seabury, please. [128]

Q. I ask you whether that was the letter your  
agent, Mr. Oliver, addressed to the Southern Pacific  
Company with reference to these cars. A. Yes.

Mr. STONEMAN.—No objections.

(Mr. Seabury reads Defendant's Exhibit No. 3.)

It is a fact that I placed the original order as early  
as February 13, for delivery in April and May. In  
the face of that fact I still wish to be understood that  
I regarded it as absolutely safe as late as May 13,  
1913, to be without cars at all, for the shipment I  
was looking at on May 13, 1913, at the ranch of the  
Alamo Cattle Company, because there would not have  
been over eight or nine cars if I had taken every  
animal they had that complied with the contract. It  
was only a cancellation of part of the cars. About  
sixteen hundred cattle could have been loaded on the  
thirty-two cars that I canceled on the 9th of May—  
thirty-two cars, would have been handled in one train.

The expression "train-load" means anywhere  
from fifteen to thirty-two cars. If a man had thirty-  
four or thirty-five all together, it would go out in the  
same train. I have seen forty or fifty, but that is  
exceptional.

My understanding of the expression "train-load"  
used in the contract is not less than fifteen cars. Any  
more that they might deliver. The defendant had

(Testimony of John G. Hall.)

the option to fill any number of cars greater than that.

Mr. SEABURY.—Q. I show you a letter dated May 5, 1913—purported to be signed by J. G. Hall, per P. B. Dickson, and ask you to look at it and state whether or not that was sent by your authorized agent to the Southern Pacific Company.

A. It is; yes. As I understand it, this blanket order that was put in under date—I don't remember the date—some time in February.

Q. Pardon, Mr. Hall, just answer the question. Did that go out with your authority—by your authorized agent?

A. By my [129] bookkeeper.

Mr. STONEMAN.—Absolutely no objections.

Mr. SEABURY.—We ask that it be marked for identification. It is Defendant's Exhibit No. 4. (Reads.)

The COURT.—What is the date of that letter?

Mr. SEABURY.—May 5.

Q. Now, Mr. Hall, I wish you would tell us again what it was that was said between you and Mr. Kibbey in regard to the offer to retain four thousand dollars and to pay you six thousand dollars. Tell us first, please, when this conversation took place.

A. It took place the following day—May 14th—after we had been down to the ranch looking at the cattle. In Mr. Kibby's room in the Montezume hotel, in Nogales, Arizona. Mr. Kibby, Mr. Oliver and myself were present.

Why, I don't remember what took place; I can't

(Testimony of John G. Hall.)

say positively whether Mr. Elias was there or not. He had a very sick child. He was with us part of the time. I don't know whether he was there when the conversation took place or not. Mr. Kibby thought that he was entitled to a certain amount of this money, on account of having to gather and hold these cattle, and I told him it was no fault of mine that he did not have the cattle to deliver to me in train-load lots as required by the contract; that I was damaged more than he was. But he seemed to insist that that was the best settlement that he would make—allow him to retain four thousand dollars, and pay me six thousand dollars in deferred payments, to which I objected. And I told him that I considered the damage was coming to me, not to him; that I had the cattle sold. I explained to him how I had these cattle sold out, and I would have to lose my profit on the cattle; and we discussed it back and forward for considerable time, and finally he said that he would not make any settlement unless he could get approximately four thousand dollars out of [130] the deal in some way or other, and we finally—he finally said that he thought he could make four thousand dollars profit on this thousand head of big steers, if I would give him until fall to get them. I told him I would do it if he gave me a contract and a receipt on the contract for ten thousand dollars. I would have taken ten thousand dollars from Mr. Kibby or anyone else at that time and date and would have quit the deal. It isn't a fact that any settlement between me and Mr. Kibby was dependent entirely upon Mr.



(Testimony of John G. Hall.)

Myers being satisfied with the transaction. We had nothing to do with Mr. Myers. I had a contract with Mr. Myers. I was under contract with Mr. Myers to pay him three dollars a head clear profit on two-year old steers.

After this talk I had with Mr. Kibby I didn't have a contract with Mr. Myers in regard to this matter. I didn't see Mr. Myers, at all after May 13, 1913, until some time in June when I saw him in El Paso, but I don't remember definitely what conversation I had with him. Nothing impressed itself upon me as being important.

Q. Did you or not state to Mr. Myers at El Paso, in substance, that you, or Mr. Oliver, had made a mistake?

Mr. STONEMAN.—We object, if your Honor please, on the ground that it is not proper cross-examination upon any subject upon which he was examined in chief, and not competent unless counsel desire to make this witness their own witness for this purpose.

The COURT.—Now, is that material, Mr. Seabury, if he did make a mistake? Is that material in this case? He might have come to that conclusion, in view of the facts and circumstances, but would that shed any light on whether or not this contract had been complied with by the defendant or by himself?

Mr. SEABURY.—We thought, if your Honor please, that an admission to indicate that Mr. Hall admitted at that time that he was in [131] fault; the expression that he had made a mistake in not accepting the cattle, we thought, included such an infer-

(Testimony of John G. Hall.)

ence, and if so, it would be an admission against interest, and we have a right to show that Mr. Hall did say that he said so to him at that time.

The COURT.—Objection sustained.

Mr. SEABURY.—We except.

I discussed these cattle that I saw in May, 1913, at the ranch of defendant, with Mr. Johnson, the representative of the Clay, Robinson Company. It isn't a fact that I told Mr. Johnson that those cattle were in every respect up to my contract. I didn't ask him to take those cattle. I told him I could not think of asking him to take the cattle under the contract. I don't remember distinctly where we were.

I could not say that I had told all of the conversation that took place between me and Mr. Kibby on the 14th of May in Nogales, with reference to this proposed settlement. I told you the practical and essential part of it.

I did not reject the cattle on the ground that they were not branded. The sole grounds of my objection were that the cattle were not as good as Terrazas cattle, and there was not a train-load of them. In other words, my objection was that there was not a train-load of the cattle as good as, or better than, Terrazas cattle offered to me by the defendant in shipping condition. I think that is all the objection that I made. I am quite certain Mr. Elias told me on May 13th he had never seen the Terrazas cattle. I told him this cattle didn't come up to the Terrazas cattle in quality and grade. He said, Mr. Hall, I don't know as to that; I know nothing and never saw

(Testimony of John G. Hall.)

the Terrazas cattle.

I think fully ten per cent of the cattle of that lot of eleven hundred that I saw on the 13th of May, 1913, were too weak to ship. There was more than forty-five per cent in condition to ship of all the cattle they had together there, but fully forty per cent of [132] them were yearlings. That is my estimate, I think, as accurately as I could estimate.

Thereupon the Court took a recess until two o'clock, the jurors being admonished by the Court as heretofore, and at the conclusion of the recess returned into court, both parties being present, the plaintiff in person and by his counsel, and the defendant by its counsel, and thereupon the following further proceedings were had herein, to wit:

JOHN G. HALL continued to testify as follows:

Mr. Johnson refused to accept cattle which I offered him under his contract with me at the time that the first shipment was effected.

Q. He saw the cattle that the defendant offered to supply under its contract with Myers about May 9th, did he not?

A. It is a fact that Mr. Johnson saw some cattle which the defendant was ready to deliver under this contract about May 9th. It is also a fact that after that time and after he had seen those cattle shown him at that time, he refused to accept them under my contract with him.

Q. You have said, as I understand you, that the only ability which you had to perform your contract with Myers and with the defendant here was depend-



(Testimony of John G. Hall.)

ent upon Mr. Johnston's acceptance of your cattle; isn't that so?

A. Well, I am satisfied that Mr. Johnston or rather Clay, Robinson & Co. through Mr. Johnston, would have paid for any cattle I accepted under that contract. I had that arrangement with them.

Q. So the only purchaser you had at that time, May 9th, was in reality Johnston, through Clay, Robinson and Co.?

A. Well, I couldn't sell the cattle twice. I had already sold them to Johnston. I couldn't sell them to anybody else.

Q. So as I have said, you had no other ability to take those cattle, if they were not acceptable to Mr. Johnston, isn't that [133] so?

A. As I said before, Mr. Johnston was ready to take anything that I accepted under the contract. He was ready to pay for anything I accepted under the contract.

Mr. SEABURY.—That's all.

Redirect Examination.

(By Mr. STONEMAN.)

Q. I hand you this paper and ask you to tell me what that is.

A. That is the original contract that I made with Clay, Robinson & Co. for the purchase of these cattle.

Mr. STONEMAN.—We offer it in evidence and ask that it be marked plaintiff's exhibit with the proper designation.

Mr. SEABURY.—No objection.

(Testimony of John G. Hall.)

Received in evidence and marked Plaintiff's Exhibit "O."

Exhibit read to jury.

Q. Mr. Hall, did Clay, Robinson & Co. or their agent, Mr. Johnston, ever indicate to you that this contract that has just been read was cancelled or would be cancelled in the event you were able to deliver cattle purchased, contracted to be purchased from the Alamo Cattle Company?

Mr. SEABURY.—We object to the question as not relevant to the case and not binding upon the defendant.

The COURT.—What is the purpose of that?

Mr. STONEMAN.—If your Honor please, it has been attempted to be brought out on cross-examination. The evident intent of the question is to show that this contract of Clay, Robinson & Co. was cancelled before—according to Mr. Hall's testimony—the Alamo Cattle trade was declared off. For that reason the source of the ability of Mr. Hall to pay for the cattle that might be delivered under the Alamo contract had failed and was no longer available. I simply was asking it on account of the cross-examination.

The COURT.—I overrule the objection. [134]

Mr. SEABURY.—We except.

Q. What is the answer?

A. I hardly know how to answer that question. There was no formal cancellation of the contract. They still wanted the cattle and I gave them all the

(Testimony of John G. Hall.)

assistance I could and furnished them several thousand head of cattle to take the place of these cattle that I should have got from the Alamo Cattle Company.

Mr. SEABURY.—We move to strike the answer out as not responsive and also upon the ground that the answer includes alleged statements between Mr. Hall and Mr. Johnston which are in no way binding upon the defendant in this case.

The COURT.—The statement was made by Mr. Johnston you say?

Mr. SEABURY.—Yes, your Honor. The answer included alleged statements, as I understood it, between this gentleman and Mr. Johnston. His desire to comply with the Clay, Robinson contract which is in no way material or relevant to the issue here.

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

Mr. Oliver and Mr. Kibbey were present at the hotel in Nogales at the time of the conversation about which I was cross-examined by Mr. Seabury this morning. I think Mr. Elias was in the room part of the time, only a part of the time. The conversation arose from the statement that Mr. Elias made when I was out at the herd that he couldn't do anything. When he said he couldn't deliver these cattle, I said, "What do you want to do about it?" He said, "I don't know until we go back to town and see Mr. Kibby." When we got back we all went to see Mr. Kibbey, went to his room and discussed the matter. Mr. Elias stayed there for



(Testimony of John G. Hall.)

a short time and was called away, I think, by the sickness of his little child. The ten thousand dollars which had been paid were certainly referred to.

Q. How did the offer of settlement happen to be made?

A. It was [135] made after I made demand for return of my ten thousand dollars after Ramon said he couldn't deliver the cattle.

Mr. STONEMAN.—That's all.

**[Testimony of K. D. Oliver, for Plaintiff.]**

K. D. OLIVER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

My name is K. D. Oliver. I am acquainted with Mr. Hall, Mr. J. A. Johnston, Mr. H. W. Moore, Mr. Ramon Elias, Mr. Kibbey and Mr. Ed. W. Myers. On January 16th, up to and including the first day of June, 1913, I was manager of Mr. Hall's business and as such represented his interests in the transactions had with the Alamo Cattle Company concerning the delivery of certain cattle under a contract. I have been engaged in the cattle business about 15 years. I have had experience in running and gathering Mexican cattle. I know a grade of cattle in old Mexico known as the Terrazas cattle.

Before February 4, 1913, I ran a ranch adjoining one of the Terrazas ranches in Mexico and I have

(Testimony of K. D. Oliver.)

bought a good many of the Terrazas cattle. The Terrazas cattle are better bred cattle, and different from ordinary ranch cattle in that they have been crossed with American bulls, bred up. It shows in the frame, and bone and color, size, general quality. There is a difference between Terrazas cattle and ordinary range cattle in Mexico as to their shipping qualities. About 50 or 48 head of two-year old cattle of the grade, kind and character of the Terrazas cattle can be loaded in a 40-foot cattle car. It depends on the age and on the condition of the flesh too.

On or about the 6th of April, 1913, I made a trip into Mexico for the purpose of inspecting these cattle as the representative and authorized agent of the plaintiff Hall. It was the second [136] trip that I made to Mexico to inspect these Alamo cattle. I made the first trip in January, 1913, that was before Hall bought the Myers and Tankersley contract. The first trip in Mr. Hall's behalf was the trip I made about the 6th of April, 1913. I went down there that time to show the cattle to Mr. Johnston and Mr. Moore. Mr. Johnston was manager of Clay, Robinson and Company office in Denver and Mr. Moore was a cattleman from Colorado. I do not think that prior to that time I had any conversation with either Mr. Kibbey or Mr. Elias with reference to these cattle. On the trip I made down about the 6th of April for the purpose of inspection, both Mr. Elias and Mr. Kibbey were present. Neither Mr. Kibbey or Mr. Elias told me on that trip that the herd in which I was riding was a herd gathered for deliv-

(Testimony of K. D. Oliver.)

ery under the contract at issue in this suit. It wasn't a herd gathered for delivery. There was no herd. There was no herd, just a few rounded up and held for inspection. Mr. Elias and Mr. Kibbey pointed them out as samples of the cattle to be delivered under the contract. The cattle they pointed out at that time were contract cattle and were fully up to the grade and complied with the descriptions called for in the contract, Plaintiff's Exhibit "A," with which I am familiar. I don't know exactly as to the number, but there weren't many.

I next went into Mexico upon the business of Mr. Hall connected with this contract in the early part of May, the first week or ten days of May, to receive the herd of cattle of the Alamo Cattle Company under this contract. The Alamo Cattle Company had sent a telegram or letter stating that the cattle were ready for delivery. Mr. Johnston of Denver and Mr. Howe of El Paso went with me. Mr. Johnston represented Clay, Robinson and Company in Denver, with whom Mr. Hall then had an existing contract as to the disposition of these cattle which were to come to Hall under the contract. We went about May 9th, 1913, to a [137] ranch known as the Distilladero, one of the pastures of the Alamo Cattle Company. They said they had about a thousand head of cattle gathered there. I thought it ran a trifle short of that. I rode through that herd for the purpose of inspecting them. From my inspection I consider that a very small portion of the herd would have been cattle of the sizes, ages, quality and brands called for



(Testimony of K. D. Oliver.)

in the contract referred to as Plaintiff's Exhibit "A." I should say not more than 50 per cent if—not more than 50 per cent if that many. The rest of them were either short, aged, deformed or runts, or tender-footed, or thin, ill-shapen, or something of that—or not of the grade, not of sufficient quality to be of the same grade. Of the cattle that I inspected at that time I shouldn't say came up over four or five hundred head to the requirements of contract cattle. About eight or ten carloads. Out of which under the terms of the contract there was still to be a cut of 15%. On that occasion I had a conversation with reference to these unmerchantable cattle with both Mr. Kibbey and Mr. Elias. I told Mr. Elias that the cattle were not contract cattle; that we didn't want to take them; there weren't sufficient numbers and that the herd of cattle wasn't properly tendered. It wasn't in shape for the buyer to cut—to pass on them. They hadn't cleaned up the herds themselves. At first Mr. Elias said he didn't agree with me. Then upon our arguing the matter he said he agreed that they were not contract cattle; that there were many cattle in there that were not contract cattle. Mr. Kibbey said substantially the same as Mr. Elias at that conversation. Before that conversation they had requested that I accept this herd as contract cattle. At that time and immediate place I did not see any four year olds.

Q. At any time did Mr. Kibbey or Mr. Elias for the Alamo Cattle Company offer or tender any four year olds under a claim [138] by them that they

(Testimony of K. D. Oliver.)

were contract four-year olds?

A. No, sir; at no time.

Mr. SEABURY.—I move to strike out the answer, if your Honor please, upon the ground that there has been no proof up to the present time that the plaintiff demanded a delivery of four year old cattle under this contract and until such proof is offered, it is improper to try to show the failure on the part of the defendant to deliver such cattle. We are not under any such obligation until demand has been made.

Mr. STONEMAN.—If your Honor please, I don't quite catch the force of my friend's objection, in that there is no provision in the contract that demand shall be made by the buyer of either four year olds or two year olds and that the demand is made on the examination for delivery.

Mr. SEABURY.—The last clause of the contract, Plaintiff's Exhibit "A," "cattle to be cattle, etc."

Mr. STONEMAN.—The only cut that is mentioned in the contract, if your Honor please, is the cut of 15% after tender has been made of cattle in train-load lots, exclusive of unmerchantable cattle and cattle not up to contract.

Mr. SEABURY.—The cutting, if your Honor please, is the privilege of the buyer. It had nothing to do with the seller's obligation and the seller's obligation to deliver did not accrue until he had received fifteen days' notice of delivery in train-load lots. We submit the contract means that if the ground of rejection on the part of plaintiff was going

(Testimony of K. D. Oliver.)

to be that cattle were not *four olds*, instead of two, he must first show he asked for four year olds. There isn't any such proof at all. There is no proof that they objected at any time upon the ground that they were not four year olds. We think until they show that they made request on the defendant that there be such quantity of four year olds there could be no breach of the [139] contract in that respect.

The COURT.—In view of the testimony in this case, I think that is a proper question and I overrule the objection.

Mr. SEABURY.—We except.

At the Distillidero ranch at the time of this conversation Mr. Kibbey and Mr. Elias agreed to make another gathering of two year old steers and tender us on about the 25th of May from 2,000 to 2,500 head more cattle. We then went back to Nogales together in two or three machines. After we got back to Nogales we simply talked over the situation again and agreed that we would come back on the—on the 25th to receive—to pass on the 2,000 or 2,500 head of cattle that Mr. Elias and Mr. Kibbey agreed to have gathered at Distillidero. Discussed that matter more fully. That was on May 9th.

I think there were a sufficient number of cars at Nogales to receive a train-load of cattle, if they had been delivered in train-load lots on the 9th or thereabouts. They were ordered. I am quite sure they were there. I remember we were checking it up with the agent, of speaking to him when I got off the train.

Q. Do you know whether or not there was any can-



(Testimony of K. D. Oliver.)

cellation of the order of any of these cars?

A. I cancelled them myself.

Q. When?      A. I don't remember the exact date.

Q. Before or after this trip to Mexico about which you testified?

A. That I am not sure. I cancelled them because— if I cancelled them before, it was because the cattle would not have been loaded on the date I ordered them for. If I cancelled it afterwards, it was after I saw the cattle.

Mr. SEABURY.—We object to the hypothetical answer of the witness. We think that is not a proper response to the inquiry and we move to strike it out.

The COURT.—I overrule that objection.

Mr. SEABURY.—Exception. [140]

I sent a telegram from Tucson to the agent of the Southern Pacific at Nogales in words indicated by Defendant's Exhibit 1. Since reading that telegram I am now able to say why I cancelled the car order. It was because the cattle weren't ready. And that was after my return from Mexico when I looked at these cattle. After I sent this telegram from Tucson I went to El Paso, after I sent this telegram. I think two days later I returned from El Paso in company with Mr. Hall at his request for further inspection of cattle claimed to have gathered by defendant under the contract. That was about the 12th of May. I again inspected some cattle under herd by the Alamo Cattle Company. I think they were practically the same. In exactly the same spot, I think. There

(Testimony of K. D. Oliver.)

may possibly have been a few more, hundred or two more head. Possibly the same proportion as the first herd were contract cattle. The cattle of this second herd that were not contract cattle were short aged, runts, thin cattle, tender-footed cattle, sway-backs, stags.

Q. Are tender-footed cattle merchantable cattle?

A. They are not shipable cattle.

Q. Why?

A. You cannot ship them. They lie down and are tramped on.

On this second occasion Mr. Elias said that the cattle were contract cattle and I said that they were not and pointed out certain cattle that were contract cattle, and he said, then, that if we wanted all cattle like that, he could not fill the contract. Mr. Hall and Mr. Ed. Myers were also present. I don't think Mr. Kibbey was there. Mr. Hall cut out some of the cattle in that bunch. I was on a horse with him in the herd, and looked the cattle over with him. The purpose of cutting out those cattle was to see what kind of cattle we wanted—to take them if there was a sufficient number to take. There were not there cattle of the kind and quality which I cut out sufficient [141] in number to make up a train-load lot. I said something about the conversation had with these gentlemen to the effect that they would gather twenty or twenty-five hundred head for delivery late in May, 1913. I was acting as the agent of Mr. Hall during the month of May, 1913.

Q. Did Mr. Kibbey or Mr. Elias, or either of them,

(Testimony of K. D. Oliver.)

attempt to make the delivery of twenty or twenty-five hundred head during the month of May?

A. No, sir.

Mr. SEABURY.—We object to that, if your Honor please, upon the ground that there is no proof of any demand for that delivery at that time, and move to strike the answer.

The COURT.—Objection overruled.

Mr. SEABURY.—Except. Your Honor, may it appear of record that the ground of the objection was that it does not appear that the defendants were given fifteen days' notice before this alleged failure on their part.

Mr. STONEMAN.—For the purpose of aiding your Honor in the ruling, I submit that there is a telegram in evidence here to ship any number of cattle they wanted to, dated on the 14th day of May.

The COURT.—I remember that.

Mr. STONEMAN.—The telegram I have referred to, may it please the Court, is this telegram: "I am ready and willing and hereby demand all cattle coming within the contract of January 16th with Meyers, which contract was transferred to me, delivery to be made between May 29th and June 1st, 1913, in train-load lots. Advise when you want cattle cut." Dated, March 14th, 1913, at El Paso, and signed J. K. Hall.

The Alamo Cattle Company did not tender to me or J. K. Hall any cattle between the 14th day of May, 1913, and the first day of June of that year.



(Testimony of K. D. Oliver.)

Mr. STONEMAN.—You may cross-examine.  
[142]

Cross-examination.

(By Mr. SEABURY.)

Q. Mr. Oliver, I show you a letter dated February 4th, 1913, and ask you if your signature is attached to it. A. Yes, sir; that is my signature.

Mr. STONEMAN.—No objection.

Mr. SEABURY.—(Reads:) “J. K. Hall, Livestock Commission, El Paso, Texas—Alamo Cattle Company, Magdalena, Sonora, Mexico. I beg to advise that I have this day sold and transferred all my right, title and interest to the contract I hold with your company, dated January 16th, 1913, for four to five thousand two year old steers and one thousand four year old steers to J. K. Hall, of El Paso, Texas. Mr. Hall shows his approval of this letter by signing with me, and also his willingness and intention to carry out the terms of the contract in every way.” Signed, E. W. Meyers, J. K. Hall, by K. D. Oliver, Manager.

(By Mr. SEABURY.)

Q. I show you another letter dated April 21st, and purporting to be signed K. D. Oliver, Manager, and addressed to the Alamo Cattle Company, and ask if you signed the letter.

A. Yes, sir, that is my signature.

Mr. STONEMAN.—No objection.

Mr. SEABURY.—(Reads:) “J. K. Hall, Livestock Commission, El Paso, Texas, April 21st, 1913.—Alamo Cattle Company, care First National Bank,

(Testimony of K. D. Oliver.)

Nogales, Arizona. Gentlemen: With reference to the cattle we have purchased from you, we beg to advise that we would like to receive the first train of two year old steers to load at Nogales, about the 10th of May. We wish you would advise by return mail or by wire if you are delayed in getting this letter, the exact date it will be necessary for the writer to be in Nogales to go with you to cut the cattle. We want to receive these two year old steers in train-load lots of 1,000 or 1,500 head as [143] the person who has purchased in Montana has several days to drive from his place to the train and does not wish to drive without this bunch. Awaiting your reply, which will enable us to place an order for the exact number of cars we will require (the original blanket order having been placed), we beg to remain, Yours truly, K. D. Oliver, Manager."

(By Mr. SEABURY.)

I cancelled the order for the train to take these cattle from the Alamo people on May 9th after I had inspected a lot of cattle on that day. I came back to the Alamo ranch and examined more cattle under this contract with Mr. Hall on the 13th. I knew at the time I examined those cattle on May 13th—that my order had been canceled on the 9th. On May 13th I had a blanket order outstanding to receive cars.

Q. Don't you know that a blanket order is not sufficient for the company to have cars for your disposal without a special order?

A. They had cars in Nogales.

Q. How do you know they had cars in Nogales?

170 *Alamo Cattle Company, Sociedad Anonima,*  
(Testimony of K. D. Oliver.)

A. I don't.

Q. How do you know they had enough to take a thousand head of cattle?

A. The agent at Nogales told me. That is my only source of information.

Q. The fact remains that you had not placed any order?

A. I had placed a blanket order to take care of the whole shipment. The length of time before you want cars of this kind it is necessary to give the order depends on the time of the year. May, 1913, was the middle of the cattle season in Nogales. It was apparently the rush season. I knew cattle were being shipped at that time. The cars ordered by ourselves were not in use at that time. I mean to say the Southern Pacific Railroad Co. was saving cars at Nogales for our use under a blanket order of February 17th, 1913. Notwithstanding the fact that I had canceled the order for thirty-two cars on the 9th of May. [144]

I went to Mexico to examine cattle in January, 1913, also in April, 1913, and also on the 9th and 13th of May, 1913.

I did not say that our blanket order was sufficient to entitle us to the immediate use of cars at Nogales. I said the blanket order would protect the cars being there. I mean that that would provide that cars would be on hand, provided we ordered them in time. Provided a definite order was given. A definite order was given for the 9th. On the 13th no definite



(Testimony of K. D. Oliver.)

order was given. But the blanket order still existed. I considered that the existence of the blanket order justified me in not ordering cars for the 13th. I sent in the telegram on May 9th to save demurrage.

Q. I ask why did you order thirty-two cars to be ready for you on May 9th if you were satisfied under a blanket order they would have sufficient cars there.

A. If they had the cars on May 9th the chances were they would have the cars in that vicinity. That was the reason. On the 9th of May I told Mr. Kibbey and Mr. Elias that cattle which they showed me at that time for delivery to our people on the contract were not as good as or better than Terrazas cattle. On the 9th I asked them to supply us with a train-load of cattle and they failed to do it. I should think it would be considered as a breach of the contract. I don't remember how I regarded it. I wanted the cattle.

After I left Nogales on May 9th I went back to El Paso. I got there the following morning, I presume. I went straight back, stopping only here in Tucson long enough for a train.

I said I had a conversation with Mr. Kibbey and Mr. Elias on the 9th, in which he said he would have another bunch of cattle to offer me about the 24th or 25th of May. There was no talk between me and Mr. Kibbey and Mr. Elias in regard to any compromise of this situation. At that time there were no talks at all. I did not see Mr. Myers. Mr. Johnston was present at some of the talks [145] I said I had with Mr. Kibbey and Mr. Elias.

(Testimony of K. D. Oliver.)

These cattle had already been sold to Mr. Johnston. The reason I brought Mr. Johnston down was not to find out whether these cattle would be accepted by Mr. Johnston. He came down to be present when the cattle were delivered. When one buys anything he likes to be on hand. I did not bring Mr. Johnston down for the purpose of finding out whether he would accept them. Mr. Johnston was with me, however. He looked the cattle over with me. I and not Mr. Johnston refused to accept. They were never tendered to Mr. Johnston. The cattle were not tendered to Mr. Johnston because they were not received by me. They could not have been offered him. It is not a fact that in the presence of Mr. Elias and Mr. Kibbey on May 7th I told Mr. Johnston that those cattle were up to the contract. The sale to Mr. Johnston of these cattle had been made. I came to receive these cattle. Mr. Johnston could not refuse to receive the cattle had they been contract cattle. I did not make any tender to Mr. Johnston on May 9th of the cattle which were offered by the Alamo Cattle Company. I did not. How could I? The responsibility for the receipt or rejection of those cattle rests entirely with me. On the 9th of May the only thing left open between me and Mr. Kibbey and Mr. Elias was that they were to deliver twenty-five hundred head of cattle on the 25th. They agreed to that. I don't think there was any reason for me to communicate with them between the 9th of May and the 25th of May on that subject. Oh, I forgot. There was a man in Tucson waiting to hear about these

(Testimony of K. D. Oliver.)

cattle—one of Mr. Johnston's customers—and if he wanted to take cattle in less than a train-load lot, I was to come back the next day and examine these cattle again. However, I did reject these cattle on May 9th as contract cattle.

Q. You still want to be understood that these were not contract cattle?

A. There was not a train-load lot. [146]

Q. You want us to understand, then, that you told Mr. Kibbey and Mr. Elias on the 9th of May that the cattle these gentlemen offered you were not contract cattle because they were not in train-load lots?

A. That is one of the reasons.

Q. What was another?

A. They did not have enough.

Q. Was there any other reason?

A. I did not want to handle in less than train-load lots. After cutting out the sways, runts and cripples, we did not want to handle them if less than train-load lots. I told Mr. Kibbey and Mr. Elias that these cattle were not as good as Terrazas cattle. I declined to accept them on that account. At that time I tried to say they were not in train-load lots. There were not enough cattle. They were sorry and too thin to ship. That all brings us down to the fact that they did not have a train-load. I objected to the cattle because they were not contract cattle. I pointed out the various defects. The defects were, short ages, runts, sway-backs. As a matter of fact, there was no possible ground for exception that I did not take. It was my business to protect Mr. Hall's



(Testimony of K. D. Oliver.)

interests. I was going to do it. I was playing safe all the way down the line. I was not raising the question all down the line as to whether the contract existed or not. I did not say in substance to these gentlemen that while these cattle are not good under the contract, and I am not required to take them, yet after I get back to Tucson I may take them. But if Mr. Tainter took them, I would. He was a man who was going to get the cattle. My rejection of the cattle on May 9th did not depend on Tainter's rejection of the cattle. Under the contract I turned the cattle down first. Then I said if Tainter takes the cattle, I will take them. I made that statement in Mr. Hall's behalf.

Mr. Kibbey and Mr. Elias were to hear from me as to whether or not I was to take the cattle. I sent a telegram from Tucson [147] the night of the 9th. I know I wired at that time that I would not be back; that I was going to El Paso. I did not wire whether or not Mr. Tainter was going to take the cattle. It was understood that if I did not come back the next morning I was not to take them.

Q. Now, I show you a telegram dated May 9th, and purporting to have been signed by you.

A. Yes, that is right.

Q. Addressed to W. B. Kibbey at Nogales, and ask if you sent it. A. I sent it.

Mr. STONEMAN.—No objection.

Mr. SEABURY.—(Reads:) "Tucson, Arizona, May 9th, 1913: W. B. Kibbey, Jr., Nogales, Arizona—Going El Paso in the morning and will write you

(Testimony of K. D. Oliver.)

fully from there. E. D. Oliver.”

Q. So that, on the 9th of May, when you sent your telegram you did not advise them anything at all with reference to Tainter’s attitude in regard to these cattle?

A. It was understood that if I did not come back on the 10th they would not hold the cattle for us for that delivery. This telegram was the advice. I did not intend to write fully from El Paso and tell him about the acceptance of the cattle. There was nothing to write about Tainter. I was to write about the further delivery of the cattle. That is the best explanation I can give of the telegram. That telegram explains that I went to El Paso. That is the only significance I attach to the telegram. That I went to El Paso and not Nogales.

Q. And that, according to the statement given of your arrangements with Mr. Kibbey and Mr. Elias was that Tainter had declined to accept the cattle?

A. That Tainter had declined to come down and look at them.

Q. You did not say anything about Tainter coming down to look at the cattle?

A. I think I did. I intended to. I don’t recall seeing Mr. Myers at all on May 9th. I saw him on May 13th. He [148] was on the ground then. There was a general talk between me, as the representative of Mr. Hall, and Mr. Elias and Mr. Kibbey and Mr. Myers, with reference to a compromise or adjustment of the situation. I don’t know that there was any special talk in which I participated. I

don't know that Mr. Myers was present. I cannot remember whether or not he was present. He was present in the herd in Mexico, and after we came back and went to Mr. Kibbey's room in the hotel, I don't remember whether or not Mr. Myers was present.

I think Mr. Myers was present in the herd of cattle in Mexico on the 13th and that he stated to Mr. Hall that the cattle were up to the contract.

I cannot recall whether or not I heard him say to Mr. Hall at that time that the cattle were up to the contract between him and Hall. I don't remember having any talk with Mr. Kibbey or Mr. Elias either on the 9th or 13th of May in which I told them that it would not matter whether Mr. Johnston took the cattle or not, that, if he did not, Mr. Hall has another purchaser in New York coming for them. I do not recall anything similar to that.

Q. Do you know whether there was any other deal pending between Mr. Hall and anyone else to take these cattle if Mr. Johnston refused them?

A. I cannot say definitely but it seems to me that there was another place to put the cattle. That is my best recollection. Tainter was to take the cattle to Montana. He is the man referred to in these letters as the man from Montana. I made the arrangements for Mr. Hall about the cars. I was in charge of the closing of this cattle contract.

On the 9th of May when I examined these cattle I expected immediate delivery of the cattle on that day. If the cattle had been satisfactory to me I



(Testimony of K. D. Oliver.)

would have received them immediately, as soon as practicable, that would have been, either that or the [149] next day. I don't know the exact distance of travel. The ranch was at Distillidero. I should say it is nine or ten miles for the cattle and perhaps one-third longer in the machine.

If I had found the cattle on May 9th to be satisfactory they would have immediately moved north.

It is my impression now that I had the cars waiting for them on the 9th at Nogales. That was before the cancellation of the order for the thirty-two cars.

Q. And I ask you, before May 9th, whether you made any arrangements whatever with the First National Bank at Nogales for the guaranteeing of the payment for those cattle.

Mr. STONEMAN.—We object for the reason that there is no evidence upon which that question can be based, in that it does not appear that the cattle were contract cattle already for delivery free on board cars at Nogales, and, under the contract, we don't have to make arrangements except under those conditions.

The COURT.—I would like to hear counsel for the defendant on that.

Mr. SEABURY.—I don't think I care to be heard on it, your Honor.

The COURT.—I sustain the objection.

Mr. SEABURY.—I except.

I got to the ranch in Mexico on the 9th of May, about noon. I still say that if these cattle had been

all right I would have immediately moved them north. I don't know whether they would have traveled as far as Nogales by night. The length of time it takes to drive nine miles depends on the country. We did not go over the country the cattle would have gone over. We went around the road, and the cattle would have gone through the hills. I am not sufficiently acquainted with the hills—

I suppose the Bank at Nogales closes at the usual banking [150] hour of three o'clock. I was not in the bank in Nogales prior to my going to the ranch in Mexico on the 9th of May, 1913, for the purpose of making arrangements for the guaranteeing of this payment. I never saw any of their officers and never made any arrangements of any kind or character for that purpose.

(Recess of ten minutes from 3:50 to 4 P. M.)

Mr. STONEMAN.—If your Honor please, through the courtesy of Mr. Seabury and Mr. Barry, we have arranged that this witness may be examined on other points than will probably be included in the cross-examination, in order to enable him to go back to Phoenix to-night. I am making this arrangement so that the record will not show that the objections have not been properly interposed.

Mr. SEABURY.—I have just informed Mr. Stoneman that I was about to ask a question that would not be proper cross-examination and he kindly told me to go ahead.

I was thoroughly familiar with the cattle known as the Terrazas cattle. Those cattle come from the

(Testimony of K. D. Oliver.)

State of Chihuahua in the Republic of Mexico. The American market for those cattle is any pasture country in the north. But the point of delivery is chiefly in El Paso, Texas. It is the point of entry; not the nearest market. The cattle are sold to go north, or to some pasture country. They are not necessarily sold in El Paso. They are delivered through El Paso. But practically all of them go through El Paso. I would not say there is an established market at El Paso for them any more than for any other cattle. Terrazas cattle are not entirely all sold in El Paso. They are often all sold there. The market price of Terrazas two year old steers in El Paso in or about the months of April and May, 1913, was I think more than \$23 a head but I am not positive about it. On April 6th when I went down there to examine these cattle at the ranch of the defendant in Mexico, neither Mr. Kibbey nor [151] Mr. Elias offered any of those cattle to me. They told me I could take them then if I wanted them. That is not offering cattle. My recollection is that they told me I could have a train-load of two year olds if I wanted them. I didn't want them at that time. I presume that I gave the reason. The only reason could have been that there was no place for two year olds to go at that time. There is no feed in the north, as a rule, in April. It is too dangerous on account of the storms. I think I said something like that to them in explanation of why I didn't want them. I don't remember whether or not I said anything about extending the



180 *Alamo Cattle Company, Sociedad Anonima,*  
(Testimony of K. D. Oliver.)

contract for thirty days.

Q. Did you ask them to put off the shipment until later?     A. What shipment?

Q. The cattle under this contract.

A. It was not called for until May.

I asked them not to make any delivery of two year old cattle. I think I told them on April 6, 1913, that I wanted four year olds. I think I discussed it with both Ramon and Mr. Kibbey at Magdalena. I was ready on April 6 to take four year olds. Possibly not that day, but I would have taken them shortly after that. I notified them prior to April 6 that I wanted four year olds at that time.

Redirect Examination.

(By Mr. STONEMAN.)

I attempted to get more cattle delivered to me under the contract after May 9th. No special. I was present in Mr. Kibbey's room at the Montezuma Hotel at Nogales on the evening of May 12, 1913, with Mr. Hall, Mr. Kibbey and I think Mr. Elias, but I am not positive about it. I don't recall anybody else being present. I think that as near as I can recall it, Mr. Kibbey stated to Mr. Hall and myself that he considered that we had forfeited the contract, and declared forfeited the ten thousand dollars advance money. Both Mr. Hall and I [152] protested against it, and Mr. Kibbey agreed to give us back five thousand dollars and keep five thousand, and I think then he further agreed to give us back six thousand dollars and keep four, but it seems to me

(Testimony of K. D. Oliver.)

that the six thousand was not to be paid in cash, but paid later on.

On cross-examination I stated that I said that if Mr. Tainter was willing to take the cattle, notwithstanding the fact that the cattle were claimed by me not to be up to contract and were not delivered or tendered in train-load lots, that I would take those cattle. I think I said that; yes, sir. If Tainter was willing, why we would be willing too. But I also said that the herd was not a herd of contract cattle in train-load lots. Mr. Tainter was the man from Montana. I think Clay, Robinson and Company bought the cattle for his account, and we had contracted to resell these cattle to Clay-Robinson. I was endeavoring to comply with the terms of our contract.

Mr. SEABURY.—May I have the privilege of cross-examination again, Mr. Stoneman, in this matter—with your Honor's permission?

Recross-examination.

(By Mr. SEABURY.)

I recall getting a telegram from the Alamo Cattle Company dated May 13, a copy of which you show me, but I didn't get it at Tucson. It was forwarded to me at El Paso. I don't remember when I got it. I presume right after it was forwarded.

Mr. STONEMAN.—There is no objection (after the telegram is handed to him for examination before being marked for identification and introduced in evidence).

182 *Alamo Cattle Company, Sociedad Anonima,*  
(Testimony of K. D. Oliver.)

(The telegram is marked Defendant's Exhibit No. 8.)

I recall a talk between Mr. Elias and Mr. Kibbey and myself about Mr. Myer's position in this alleged compromise. No, I don't remember exactly what was said. In substance it was possibly said that Mr. Kibbey and Mr. Elias stated that whatever arrangement was [153] made would have to be satisfactory to Mr. Myers.

Mr. SEABURY.—With your Honor's permission, I will read Defendant's Exhibit No. 8.

Mr. STONEMAN.—I should like to withdraw my consent to the admission of that copy—to the introduction of this telegram at this time, for the reason that it is incompetent, irrelevant and immaterial for any purpose under the pleadings, appearing to be a telegram referring to a contract sent to Mr. Myers.

The COURT.—How is this material?

Mr. SEABURY.—We think it shows, in a general way, if your Honor please, what we expect to claim, that this alleged talk of compromise was in reality depending, by consent of the parties, upon the approval or acceptance of Mr. Myers. The jury might find very well that the whole thing was dependent upon these various parties agreeing among themselves—in other words, getting away from the real issue in this case as to whether or not the cattle tendered at that time were as good as or better than Terrazas cattle. We think, in view of the fullest kind of examination, both direct, cross, and redirect, on the subject of this compromise, practically all of



(Testimony of K. D. Oliver.)

which would be objectionable, we are perfectly willing to have all this talk come out. Now, that it is in and this witness about to leave the stand and be excused, it seems to us that the plaintiff is in no position to claim the slightest prejudice on account of this evidence, and it is in line with other evidence that has gone in.

Mr. STONEMAN.—I do not base my objection that it is not proper cross-examination, but that it is improper under the pleadings. There seems to be some desire to get away from the real issue of the case, and that is what we don't want to do—that is, whether or not the cattle were as good or better than Terrazas cattle. We renew our objection to the offer.

Mr. SEABURY.—\* \* \* We don't rely on any compromise. We offer the [154] evidence for the purpose of showing that as late as May 13, 1913, these people were still up in the air on this proposition, and were adopting this, as we claim, as a matter of policy. We have elicited from this witness that his acceptance or rejection of these cattle depended entirely on the say-so of a third person. It is to show that in reality there was no real repudiation at all. Another thing, the last part of that, I call your Honor's attention to. In other words, we think that it is clearly susceptible of the inference that as late as May, 1913, matters had not been definitely disposed of as far as these persons were concerned; that there had not been any positive rejection of the cattle as late as that day by the plaintiff

(Testimony of K. D. Oliver.)

and his representative. The last part of that I think indicates that.

The COURT.—I sustain the objection. I will think the matter over. It is not necessary to have the witness here?

Mr. SEABURY.—I think not, your Honor. I did wish to ask him a few questions upon the latter part of this telegram.

The COURT.—It seems to me to be wholly immaterial what that discussion of the settlement was. Nothing is arrived at, and the terms of the contract according to the evidence will not be changed.

Mr. SEABURY.—I don't offer it, as I say, as attempting to prove that there was any other contract in the case, but the fact that the negotiations concerning the adjustment of the matter would tend to show what the real objection was. As I have said, we claim that the evidence already in the case and which we desire to offer in future, tends to strengthen our position that the cattle were not objected to under the contract between Myers and the defendant, assigned to Hall, but simply that he had sold the cattle at an advance, and declined to accept the cattle as he could never pay that price.

Mr. STONEMAN.—May I suggest, if your Honor please, that simply [155] because two sides to the contract are trying to arrive at some means to enable both sides to be satisfied under the terms of a contract and have been unsuccessful in it, it does not necessarily follow the contract is waived and another agreement substituted for the terms of the

(Testimony of K. D. Oliver.)

written contract itself. I make that statement to the Court as a suggestion and in support of the fact that it is hardly the right thing for Mr. Seabury to suggest that that is a waiver. We are not arguing the case before the jury, at the present time, and I should not like the jury to think that because I remained silent I assented to the view expressed by my friend, Mr. Seabury.

The COURT.—I sustain the objection for the present.

Mr. SEABURY.—With permission to renew it later, if your Honor please?

The COURT.—Yes.

Mr. SEABURY.—Then for the purpose of the record, may I present my exceptions now, your Honor?

The COURT.—Yes, sir.

**[Testimony of James A. Johnston, for Plaintiff.]**

Mr. JAMES A. JOHNSTON, being called as a witness on behalf of the plaintiff, and having been heretofore duly sworn, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

My name is James A. Johnston. I reside at Denver, Colorado. I am manager of the Denver house of Clay, Robinson Company, who are in the livestock commission business. My duties as manager are to buy and sell stock on commission. I have been engaged in that business about fifteen years in connection with this house. In pursuit of that business I have had occasion to familiarize myself with cattle



(Testimony of James A. Johnston.)

so as to be able to testify as to grades and qualities. My business is to loan money on cattle.

I have met Mr. Kibbey and Mr. Ramon Elias, representing the [156] Alamo Cattle Company. I know Mr. Hall.

On the 6th day of April, 1913, I went down into old Mexico to look at some cattle. I with one of my customers, Mr. H. W. Moore, with Mr. Oliver, Mr. Elias and Mr. Kibbey went down to look at the class of cattle that Mr. Hall had offered me for two of my customers. I subsequently entered into a contract with Mr. Hall covering those cattle. That contract was made after I went to Mexico. Before that trip I had handled a good many of the Terrazas cattle at various times. I was familiar with the grade of that strain. I saw a number of cattle while in the vicinity of the Distilladero ranch in Mexico, on the 6th of April; saw a good many cattle coming into the ranch to drink, and the second day drove out and inspected the bunch of cattle that had been rounded up by the cowboys. I saw various other cattle on the range as we were driving about. We were driving a good portion of the day.

The cattle which were exhibited to me by Mr. Kibbey or Mr. Elias, or either of them, were a good class of cattle, and I think they would grade better than the average Terrazas cattle. The second day we saw a bunch of several hundred head under herd, the cowboys had rounded them up.

There was a bunch of cattle tendered for delivery in the month of May by the Alamo Cattle Company

(Testimony of James A. Johnston.)

to, I presume Mr. Hall and Mr. Oliver, the cattle which I had been notified to receive under my contract with Mr. Hall. I was told there were twelve hundred head of cattle or thereabouts in that bunch. I didn't count them. From what I know of herds of cattle, I think the number he gave me was approximately correct. I inspected that bunch. From my inspection, I am able to say that the cattle in that herd were not as good or better than Terrazas cattle.

Q. What proportion of the cattle in that herd were below the grade of Terrazas cattle?

A. There was only about twenty or twenty-five per cent of the cattle that were tendered that were [157] up to the sample that I looked at in the first trip. Some of those were not in shipping condition.

Q. Irrespective of the samples—

Mr. SEABURY.—I move to strike out the last answer of the witness on the ground that it is not the proper test of performance under this contract as to whether or not the cattle exhibited to him in May, 1913, were as good as the samples which he looked at in April, 1913, it not appearing that the defendant had shown him anything in April, 1913.

The COURT.—I understood him to say that they went and looked at cattle that were to be delivered. Overruled.

Mr. SEABURY.—Exception.

Mr. STONEMAN.—Q. Irrespective of the cattle which were shown you as samples, which I believe you stated were in some respects above the grade—the general grade of the Terrazas cattle—what pro-

(Testimony of James A. Johnston.)

portion of the herd at that time *would*, under the general average grade of the Terrazas cattle, were not as good or better than Terrazas cattle?

A. I should say there was not over twenty per cent of them as good or better.

Q. Did you see any unmerchantable cattle in the bunch, Mr. Johnston?      A. Yes, sir.

Q. Did you see any cripples?

A. There were sore-footed cattle.

Q. Any lump-jaws, sway-backs or blinds?

A. Yes, there were sway-backs. I don't know as I noticed any lump-jaws.

Q. Did you see any runts or stags?

A. Yes, quite a number.

Mr. SEABURY.—We interpose objection to this line of examination, that even if the herd contained a substantial number of disqualified cattle, the plaintiff had the opportunity and privilege under his contract to cut out all of those, and in addition, to cut fifteen per cent after that. So, unless this witness is prepared to testify that the herd did not contain a train-load lot— [158]

Mr. STONEMAN.—I can direct your Honor's attention that there is nothing in this contract that required us to clean the herd. The only thing—and that is optional—is that we might cut fifteen per cent out of this herd. If you will show me anything in that contract, if your Honor please, requiring us to clean that herd, I am almost willing to quit this lawsuit.

The COURT.—Objection overruled.



(Testimony of James A. Johnston.)

Mr. SEABURY.—We except.

(Mr. STONEMAN.)

Some of that cattle were very small. Some of them were less than two years old. Mr. Elias informed me that he could not get certain brands of cattle that he expected to get hold of and put in on this contract.

Q. What reason did he give?

A. He stated that one particular brand of cattle that he had explained to me about wanting, white-faced cattle they called them, and owned by a certain party, had been refused delivery on account of the Constitutional government making a demand on the party for eighteen thousand dollars, and the owner of the cattle said that he was going to keep his cattle, hoping that in the future he might be able to sell his cattle and keep his money. If he sold the cattle, the new government would take it away from him, and consequently he couldn't get those cattle.

Mr. SEABURY.—I move to strike out the answer, if your Honor please, as being wholly immaterial to the issues involved in this case.

The COURT.—Objection overruled.

Mr. SEABURY.—Exception.

The COURT.—We will adjourn until ten o'clock to-morrow morning. The jurors were then admonished as heretofore.

Wednesday, May 27, 1914.

On 10:00 A. M. this day, both parties being present, the [159] plaintiff in person and by his counsel, and the defendant by its counsel, the jurors returned

(Testimony of James A. Johnston.)

into court and thereupon the following further proceedings were had herein, to wit:

Q. Mr. Johnston, how long have you been engaged in the cattle business?

A. In 1868 I trailed cattle from Texas to Colorado. I have been engaged in the cattle business ever since 1868, directly and indirectly. I have not been engaged personally in it at all times, but I have been connected with people that were. During all of this time I have had occasion to inspect and examine cattle from time to time for the purpose of determining quality and grades.

Cross-examination.

(By Mr. BARRY.)

I inspected a herd of cattle tendered for delivery by the Alamo Cattle Company to J. G. Hall at their ranch in Mexico about May 9, 1913. There were about 1200, I should think. I arrive at that figure in the first place from the information that was given me, and secondly from my experience in handling cattle—I would estimate—they weren't counted by me, but I would estimate there were about that many cattle tendered. I received the information with reference to the number of cattle that were in that herd, from Mr. Kibbey. I didn't count the cattle. In that herd probably about 20 per cent were as good or better than Terrazas cattle. I base that figure on my judgment and experience in handling cattle. From a look at a herd of 1200 head of cattle I could form an estimate that there were 20 per cent of a certain grade of cattle in that herd without counting

(Testimony of James A. Johnston.)

them, approximately so. I don't know how many sway-backs were in that herd. I didn't count them. There were a good many, that I know. How many I can't tell you. There were a good many times ten. I can't say how many times; I didn't count the cattle. I can't say, therefore, how many sway-backs there [160] were in that herd. I didn't notice any lump-jaws; there may have been, or may not; I couldn't say. I wouldn't say whether there were any lump-jaws or not. There were a great many sore-footed cattle. I consider a sore-footed animal a cripple. I didn't count how many there were. There were a great many of them, how many I can't say. There were a great many sore-footed cattle. I didn't count the runts. There were a great many cattle under size. There were a number of stags in that herd. I can't give you the number. I didn't count them. I don't know that I noticed any blind cattle. I am not prepared to say that there were any blind cattle in the herd. There were numerous cattle in that herd too thin to ship. I cannot estimate how many. I understand by unmerchantable cattle, cattle that are not in shipping conditions, that are sway-backed, sore-footed and so forth. Sway-backs, lump-jaws, cripples, runts, stags and blind cattle and cattle too thin to ship are the only classes of cattle which might be considered unmerchantable. I made my estimate of those cattle by riding through them back and forth and by my knowledge of handling cattle and estimating their condition and quality by looking them through most of my grown life. My



(Testimony of James A. Johnston.)

duty as manager of Clay, Robinson's Denver branch is to direct and control the office at that point and my particular duty is loaning money on livestock. Whenever it is necessary for me to do so I go out on horseback into herds of cattle to inspect those cattle. Within the past five years I have rarely gone out on horseback among cattle for the purpose of inspecting them. I usually drive in a conveyance in going to inspect cattle. I rarely ever go on horseback, I'd rather look at them bunched up or in yards or from a conveyance. Whenever emergency calls me I go, and sometimes I don't go probably out in a year. Other times I go several times in a year. It is very hard for me to tell how often in the last five years such emergencies have [161] occurred. I have made five inspections of this nature during the last year. This was the only time I made an inspection on horseback during the last year. I think the only time I was on horseback probably in the last five years inspecting cattle was this time. The two times that I was in Mexico last year was the only times in the last five years I have inspected cattle in old Mexico. I inspected a herd of cattle in Mexico before, during 1883-4.

Q. Now, I'll ask you another question; how many short ages, by that I mean how many cattle under two years of age was in that herd you inspected on May 9th?

A. I would make the same answer as I have made to other questions, that I didn't count them. There were a number of short ages, number of yearlings,

(Testimony of James A. Johnston.)

too. I arrive at the age of cattle by the growth of their horns and also their size and general looks, that every cattleman becomes conversant with who handles many cattle.

Q. Are those tests infallible tests, in other words, are they such tests as never fail?

A. Well, it's what you rely on. I distinguish between a yearling and a two year old by the growth of their horns and their size and general looks. The yearling has a much shorter horn than a two year old naturally. It is a fact that different kinds of cattle have different sizes of horns. It might be true in certain cases a certain grade of cattle that would be a year old would have longer horns and larger horns than another kind of cattle of three years old. But we base our judgment on the quality of the cattle. I think they depend on an examination of the teeth more or less. It is usually considered a test of the age of Mexican cattle.

Q. Do you know in what respect the teeth of a two year old steer differs from the teeth of a yearling?

A. No, sir.

Mr. STONEMAN.—In Mexico or in the United States?

Mr. BARRY.—In Mexico. [162]

Q. You don't? A. No.

Q. You therefore wish the jury to understand that you are not capable of determining the age of Mexican cattle by the only infallible rule for determining the age of such cattle?

Mr. KNOLLENBERG.—Now, your Honor, we ob-

(Testimony of James A. Johnston.)

ject to counsel testifying as to the only infallible rule.

The COURT.—The objection is sustained.

Defendant excepts.

Mr. BARRY.—I think, your Honor, that he testified that was regarded as the only infallible rule.

The COURT.—I didn't so understand it. I understood him to say that it was a test.

I do not regard the method of testing the age of cattle by their teeth as the best method of arriving at their ages. I regard their general looks and their size, growth, the quality and breeding considered as the best method of arriving at the age of cattle. There is no particular test by which a person can determine beyond a doubt the age of Mexican cattle beyond what I have stated. The size and general make-up of the animal enables us to determine approximately what their ages are. It comes near enough for us to determine ages for classifying them. I have handled a great number of Terrazas cattle. I do not know what Terrazas cattle were worth in the Denver market in May, 1913.

I've met T. J. Donohue of the Donohue, ———Co. of Omaha, Nebraska. I thing I met Mr. Donohue in Denver on or about the 27th of May last year.

I stated in my direct examination that in the herd of cattle tendered to Mr. Hall on May 9th in Mexico by the defendant that the cattle so tendered were not as good or better than Terrazas cattle.

I did not tell Mr. Donohue in Denver on or about the 27th of May, [163] that if the defendants had offered to Hall certain cattle such as he then showed



(Testimony of James A. Johnston.)

me as having purchased from the defendant that I would have been glad to accept such cattle. When I inspected the cattle in Mexico on May 9th, Mr. Oliver did not tell me that those cattle were up to the contract.

We buy cattle on orders. These cattle were ordered, a thousand head, I think, for H. W. Moore of Brush, Colorado, who accompanied me on the first trip to Mexico. The balance of them was to go to a man by the name of Tainter of New York City who has a ranch in Montana. We had purchased these cattle from Hall at \$28 per head, counted off the cars in Denver. We were to pay the freight, and other charges.

Q. What prices did you sell these cattle to H. W. Moore for?

A. We don't buy cattle on speculation. We simply get a commission. We do a commission business. Our business is exclusively commission business. And we just simply get our regular commission for transacting this business for these people for handling their order. Our regular commission is \$15 a car. After I had seen those cattle on the 9th of May I told Mr. Oliver that they weren't the cattle that I had contracted and consequently couldn't take them. The deal wasn't called off at that time, only in so far as this particular bunch of cattle that was offered for delivery. I can't give you the exact date when the deal was finally called off, but it was later on when I was informed that I couldn't get the cattle that I had contracted for. I think it was some time in the next

(Testimony of James A. Johnston.)

thirty days. I remember I had to look other wheres to get the cattle.

Q. Do you remember whether it was after or before the 13th of May when it was finally called off?

A. I can't answer as to the exact date. Our contract with Mr. Hall provided for the payment by me of \$8,000. I paid that \$8,000 about April [164] 17, 1913. Mr. Hall paid us back in money the \$8,000, every dollar of it, before the close of this last year, of 1913.

I have no interest whatever in this litigation. I have no prejudice in the matter at all. I simply contracted for certain cattle and when they were offered me for delivery I couldn't accept them. The company I represent will lose or benefit in case a judgment should be given for the plaintiff or defendant in this action only in so far as my expenses in coming down here, two trips, and the additional expense of getting cattle to fill our orders which left us very little out of the transaction.

We had orders from these two people that I mentioned to secure for them so many cattle and when we failed to get the cattle that were tendered us near Nogales, we had to secure other cattle to fill those orders, which entailed additional expense. You can't do these things without expense, in traveling over the country, and telegraphing and that kind of thing and finding and locating the cattle. It wasn't anything serious, any great amount. These expenses are already charged up to our regular office expenses and we never expect to get any return in

(Testimony of James A. Johnston.)

any way whatever for the money that we have paid out. In other words, Mr. Hall owes us absolutely nothing, and whether he wins or loses, it makes no difference with us. Mr. Hall has made no promise whatever to refund to us such expenses as have been incurred in case he should win this law suit.

Q. Did you have a conversation with Ramon Elias at the ranch in Mexico on May 9th, in which you asked Mr. Elias what he was selling such cattle as had been tendered for delivery on that date?

Mr. STONEMAN.—We object to that question as absolutely immaterial and incompetent for the purpose of proving or disproving any of [165] the issues in this case, and not proper cross-examination.

The COURT.—Objection sustained.

Mr. SEABURY.—We except.

Mr. STONEMAN.—And it not being further shown that the attempt is being made for the purpose of impeachment.

The COURT.—Any further questions?

Mr. BARRY.—That is all.

### Redirect Examination.

(By Mr. STONEMAN.)

Q. Do you know whether or not the market price of cattle of a grade as good as or better than Terrazas cattle in Denver was ever less than twenty-three dollars a head during the year 1913?

Mr. SEABURY.—Object, your Honor, upon the ground that the witness has testified that he did not know what the price was, and, therefore, cannot testify as to this question.



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(Testimony of James A. Johnston.)

Mr. STONEMAN.—The question was as to whether or not the witness knew the price in the Denver market of Terrazas cattle in May, and he said he did not. The witness may not know the absolute market price, whether it is twenty-three, twenty-four or twenty-four and a half dollars in May, but he may be able to testify whether it was less than a minimum price in May, 1913.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

(Question read: “Do you know whether or not the market price of cattle of a grade as good as or better than Terrazas cattle in Denver was ever less than twenty-three dollars a head during the year 1913?”)

(By Mr. STONEMAN.)

Q. I will add to that, the grade being based upon the fact that they were two year old steers.

A. I don't think that cattle of that class were selling for less than twenty-three dollars [166] a head during the year.

Some of those cattle in that bunch were under age. Some of them were tender-footed, and therefore unmerchantable, some of them were sway-backs, some were too thin to ship, some of them were under age, I so considered them, and some of them were of a grade not as good as or better than Terrazas cattle.  
(By Mr. STONEMAN.)

Q. And for all of those reasons you mean to be understood as saying that eighty per cent of the cattle were either under age, sway-backs, lump-jaws, cripples, unmerchantable cattle, under two years of

(Testimony of James A. Johnston.)

age, or not up to the general grade of Terrazas cattle at that time in Mexico.

Mr. SEABURY.—The same objection.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

A. I do.

(By Mr. STONEMAN.)

Since 1884 when I inspected Mexican cattle in Mexico I have had occasion to inspect Mexican cattle in the Denver yards—a great many. I have had occasion to inspect Mexican cattle of what is known as Terrazas cattle in Denver during the last five years. That inspection was made in the performance of my duties as I have described them to counsel on the other side, that is, for the purpose of determining whether they were good collateral for loans.

Mr. STONEMAN.—That is all.

Recross-examination.

(By Mr. BARRY.)

When I testified that I thought that Terrazas cattle were not offered for sale in the Denver market for less than twenty-three dollars per head, I did not mean that the cattle that were being offered for twenty-three dollars in Nogales, Arizona, would [167] be offered at the same price in Denver. Usually the freight would be added, if they were contract cattle.

Mr. BARRY.—That is all.

Mr. STONEMAN.—That is all.

The COURT.—The witness is excused.

**[Testimony of W. L. Howe, for Plaintiff.]**

W. L. HOWE, called as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

My name is W. L. Howe. I am working for Mr. Hall in the cattle business. I have been engaged in the cattle business about twenty years, continuously. During the last twenty years I have inspected cattle in old Mexico. I have received and shipped cattle out of old Mexico, State of Chihuahua. I have been working cattle in the State of Chihuahua about four years. I am acquainted with the grade of cattle known as Terrazas cattle. Well, I have been in the corrals in El Paso—the stockyards where they are brought in and classified, and have helped classify them and have handled them there, and have also handled them in Mexico. I know the general average grade of what is known as Terrazas cattle.

I know K. D. Oliver, Mr. Johnston, Mr. Kibbey and Ramon Elias.

On the 9th day of May, 1913, I was with Mr. Oliver, Mr. Johnston, Mr. Ramon Elias and Mr. J. Beckford Kibbey, Jr., at the Distillidero ranch. I went there to cut those cattle—the cattle that Mr. Kibbey and Mr. Elias were to turn over to Mr. Oliver.

I should judge between seven and eight hundred head were in that bunch of what I seen. I did not



(Testimony of W. L. Howe.)

ride through that bunch for the purpose of looking over the cattle. I saw the cattle and helped hold the cattle in the yard while Mr. Johnston and [168] Mr. Oliver were riding through. I helped herd them.

I have seen that contract or a copy of it before. (After examining Plaintiff's Exhibit "A.")

It would be pretty hard to say, but I judge from what I seen of them that there was possibly three or four hundred that was as good as Terrazas cattle. A train-load is generally considered fifteen cars. About fifty two year old cattle of the grade known as Terrazas cattle can be loaded in a forty-foot cattle car—approximately. About seven or eight hundred cattle. In that bunch there were quite a bunch that were yearlings—quite a lot of them. I mean by yearlings that they were long yearlings and not full two's. In that rejected part there were a good many that were not as good as Terrazas cattle. The Terrazas cattle in general are of a very good color, and are larger boned than the cattle I seen, and in a general way they are better cattle—larger framed. There were a great many sore footed. You cannot ship sore-footed cattle. I would say that there were quite a few of the sore-footed cattle that were unmerchantable. There were a great many under two years old. As near as I seen there were no sway-backs. There were some cattle too thin to ship. There were no cripples, blinds or lump-jaws that I seen. Some few runts, yes, sir; but stags or bulls, I don't think I seen any.

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(Testimony of W. L. Howe.)

Q. And there were some cattle of that rejected portion, were there not, Mr. Howe, which were neither runts, stags, bulls, sway-backs, lump-jaws, cattle too thin to ship, or otherwise unmerchantable, and which were two years old, which nevertheless were not up to the grade of Terrazas cattle?

A. Well, in my opinion, I don't think the average of the cattle was up to the grade of Terrazas cattle. I think between three hundred and fifty and four hundred were as good or better than Terrazas cattle.

Mr. STONEMAN.—You may cross-examine.

Cross-examination. [169]

(By Mr. BARRY.)

There were in that herd between seven and eight hundred head of cattle. I arrive at that number as follows: In the first place Mr. Kibbey said when we came up that there were about six hundred head in the herd at that time, and they were cutting a herd at that time of older cattle—of four year old cattle—three's and four's in the bunch possibly three or four hundred yards away from the two year old herd.

Mr. STONEMAN.—Will you, gentlemen, let me withdraw my submission to cross-examination for the purpose of asking another question?

Mr. BARRY.—(Makes no objection.)

(By Mr. STONEMAN.)

On May 9th, 1913, Mr. Johnston, Mr. Oliver and myself and Mr. Kibbey were in the park across from the hotel fixing to catch a train back from Nogales to Tucson and Mr. Kibbey made the remark that he was sorry that the stuff did not suit, but if Mr. Oli-

(Testimony of W. L. Howe.)

ver and Mr. Johnston would be in Nogales on or about the 25th, as near as I can remember, he would bring up two thousand head or twenty-five hundred head of two year old cattle. I well remember the remark that he said: If I buy, beg or steal them, to Mr. Oliver. I never heard anything said at that time by Mr. Kibbey concerning the question or whether or not the cattle just inspected were sufficient in numbers to constitute a carload—a train-load of full two year olds under the contract. There were no four's in the bunch with the two year olds. There were some four year olds that were being cut on the top of the hill that we were holding. I did not hear Mr. Kibbey say at any time that those were being cut for the purpose of complying with the contract.

Mr. STONEMAN.—That is all.

(By Mr. BARRY.)

I was present at the ranch when they were inspecting this herd [170] of cattle on the 9th.

Q. Is it not a fact that during the greater part of the time that they were inspecting this herd of cattle that you were having your dinner over in the kitchen, or wherever they cook their meals?

A. I had dinner with Mr. Kibbey and Mr. Oliver.

Q. You say that there were between seven and eight hundred head of cattle in the pasture at that time?

A. I said what was throwed together—I don't know what was in the pasture. I arrived at that number as follows: On arrival we were speaking of



(Testimony of W. L. Howe.)

the cattle and Mr. Kibbey said there were about six hundred head, and when they cut the herd on the hill that threw three year olds in the bunch. How many, I don't know, but I said there were about seven hundred head in the herd. Yes, and I had an idea of what was there. I have seen herds together a number of times; I had an idea of my own outside of what Mr. Kibbey said, and I judged that there were that many there—seven or eight hundred. I would swear that there was not a thousand head in the herd thrown together.

Between three hundred and fifty and four hundred head of cattle in that herd were as good as or better than Terrazas cattle. In other words, about fifty per cent of those cattle were as good as Terrazas cattle. About fifty per cent.

I did not ride through the herd to make an inspection. I don't know how many runts there were. I rode around the herd and was mixed in the cattle all the time they were looking at the cattle, and I judged from what I seen of short ages and runts and thin cattle that about fifty per cent were merchantable cattle they could ship and fill the contract. I did not go down at that time for the purpose of making an inspection. I was along to ship the cattle and also to help Mr. Oliver cut them. I had nothing to do with the inspection of the cattle. I make a rule to pay much attention to the grade when I am out. There [171] were a bunch of yearlings. I don't know how many. There are different ways of telling a yearling from a two year old—a man's judg-

(Testimony of W. L. Howe.)

ment. He would naturally take in the appearances, but if he had to look at the animal, he would tooth it. The best way to tell the age is by tothing it. In inspecting Mexican cattle it is a fact that the general appearance is very frequently deceptive if the cattle are very thin and have not had a good growth.

Q. And in a great many instances what might be regarded as yearlings are as a matter of fact two year olds?

A. Well, there could be a few two year olds that would be overlooked the same as native cattle, but, taking them all the way through, the general appearance would not fool you.

By tothing I mean looking at the teeth to see their ages. I did not inspect any of the cattle down there on the 9th of May. I could not swear positively that those cattle I regarded as yearlings were in fact yearlings.

The period of calving in Northern Sonora is from March, April and May, and, then again, through the months of September, October, November for the late calves. There is a per cent from January—a small per cent from January to March, and the greater per cent is from March, April and May. I should not think that seventy-five per cent of the calves born in Northern Sonora are born during the first five months of the year. I don't know; I could not say. The per cent would be according to the seasons, and the season they had beforehand. If they had good seasons and the season was a good season beforehand, there would be a possible chance

(Testimony of W. L. Howe.)

of seventy-five per cent being born in the first five months; and if there was not, there would not be.

Mr. STONEMAN.—I will state for the purpose of the record, if your [172] Honor please, that the witness James Gillespie is not present, and under the stipulation to the effect that as to such witnesses as are not present the affidavit may be read before the jury, under the stipulation that if the witness were present he would testify as set forth in this affidavit, I now desire to read the statement in this affidavit as to the testimony that James Gillespie would give if he were present.

(To the jury.) Without repeating, gentlemen, the stipulation, I will say briefly that it is conceded by the stipulation that the witness James Gillespie, if present, would testify to these facts.

Mr. SEABURY.—May we add to that that we at no time concede the truth of the statement, but only that the witness would so testify.

Mr. STONEMAN.—That is my understanding of the extent of the stipulation.

(To the jury.) It is agreed (reads): “That if the witness James Gillespie were present he would testify that he is a rancher and cattleman of many years’ experience, having been engaged in the purchase and sale of cattle, and is competent to testify as to the grades, brands, sizes, ages and quality of cattle that are at all times hereinafter mentioned; that he is familiar with the grade of the Terrazas cattle, and that he is familiar with the terms of the contract sued upon;



(Testimony of W. L. Howe.)

That he went to the ranch of the defendant on or about May 13th, 1913, in company with Ramon Elias, K. D. Oliver, and this affiant; that he inspected the herd of cattle gathered which Elias said were gathered for delivery under the contract sued upon; that from his inspection of the herd and his knowledge of the cattle business, the said cattle were not up to the grade of the Terrazas cattle, nor was there a sufficient number of the ages specified in the contract, nor of the brands or quality to comply [173] with the contract, in this, to wit, that there were not exceeding four hundred head of cattle so at said time tendered of the ages, sizes, brands, grades and quality required under the terms of the said contract, and that it was impossible for affiant or his agents to cut from said herd of cattle a train-load of cattle of the kind and quality required under said contract, or any number of such cattle over four hundred head."

Mr. STONEMAN.—If your Honor please, it is necessary for us to prove, from our view of it, only the citizenship of Myers. If it would not subject us to any suspicion, in the record, of collusion in this case, I would suggest that it be stipulated between counsel for the defendant and ourselves that the said E. W. Myers is now, and was at all times, a citizen of the State of Texas.

Mr. SEABURY.—We so stipulate, if your Honor please; there is no use of wasting time to prove the fact.

Mr. SEABURY.—If your Honor please, I would

(Testimony of W. L. Howe.)

like the privilege of asking Mr. Hall a few questions in the nature of cross-examination, which I omitted to ask him, if your Honor will accord me the privilege, if counsel do not object, I will appreciate it.

Mr. STONEMAN.—There is no objection.

The COURT.—Permission is granted.

**[Testimony of John G. Hall, in His Own Behalf  
(Recalled).]**

Mr. JOHN G. HALL, being recalled, testified as follows:

Recross-examination.

(By Mr. SEABURY.)

I have made no other contract than Defendant's Exhibit "O," which is the contract between myself and the Clay, Robinson Company, with reference to the purchase of the cattle which Myers was under contract to deliver to me.

Q. Isn't it a fact, Mr. Hall, that at the conversation on May 14, [174] 1913, that you had with Mr. Kibbey at the Montezuma Hotel, that you proposed to Mr. Kibbey that you would allow him to retain four thousand dollars, and allow him to return to you six thousand dollars in the fall, provided he would sell you a thousand head of steers, deliverable in the fall, at the price of thirty-two dollars per head?

A. No, sir, I never consented to allow him to hold one cent of my money.

Q. What agreement did you make with reference to that at that time?

A. The agreement that we made was that he was to deliver to me a thousand head of steers, three and

(Testimony of John G. Hall.)

four year olds—I won't say four year olds. I think Mr. Kibbey stated that he would not make them all fours. I considered any kind of a settlement that would avoid a lawsuit was a good way, and accepted his proposition to deliver me a thousand four year olds in the fall and give me a contract showing the receipt of ten thousand dollars advanced on that contract. And that was the only proposition that we agreed upon. He agreed to do that, and I agreed to accept it. He afterwards went back on it.

Mr. STONEMAN.—Q. You mean—was that agreement based upon any new consideration?

A. What do you mean by new consideration?

Q. Was it a proposal or a new contract—a proposal for avoiding trouble on the old contract?

Mr. SEABURY.—We object on the ground that it appears already from the statement made by Mr. Hall that it was a contract which comprised mutual promises, and that the mutual promises of each party was ample and sufficient to support the agreement.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

A. It was done as a compromise over this contract that is now in controversy, simply to avoid getting into a lawsuit.

Mr. STONEMAN.— [175] Q. Did you at that time, or at any other time, say to Mr. Kibbey or to Mr. Elias, that you would waive any right under the present contract?

A. No, sir.

Mr. SEABURY.—Will you wait, please, Mr. Hall,



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(Testimony of John G. Hall.)

until we have time to make our objections?

The WITNESS.—I beg your pardon.

Mr. SEABURY.—We object to it, if your Honor please, upon the ground that the question is leading and not proper redirect examination.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Your answer?

A. No, sir.

Q. Did Mr. Kibbey or Mr. Elias deliver to you any other cattle under that proposed agreement, or under the first contract?

Mr. SEABURY.—We object to that, if your Honor please, in so far as the question relates to the delivery under the contract in the suit, upon the ground that it is already answered; and in so far as it relates to the contract to which Mr. Hall has just testified, on the ground that it is not within the pleadings in this action, and as such is incompetent.

The COURT.—Overruled.

Mr. SEABURY.—Exception.

Mr. STONEMAN.—Q. Was there any delivery?

A. None whatever.

Q. As a matter of fact, on the 13th day of May, 1913, you received a letter from the Alamo Cattle Company stating that your contract was at an end?

A. Yes, sir.

Mr. SEABURY.—We object to the question as very leading and not proper redirect examination, and according to my recollection it is in contradiction of the record—the evidence in this case already.

(Testimony of John G. Hall.)

The COURT.—I will have to see the letter before I can rule on that. [176]

Mr. STONEMAN.—Letter under date of May 13, 1913; may I read it, your Honor?

The COURT.—It is not one that has been read?

Mr. STONEMAN.—Yes, sir, it is an exhibit in the case, Plaintiff's Exhibit "K." (Reads the letter to the Court.)

The COURT.—What date is that?

Mr. STONEMAN.—That letter is dated May 13, 1913, at Nogales, Arizona.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Q. You received that letter, did you not? A. Yes, sir.

Q. Now, this conversation to which counsel has directed your attention in further cross-examination; was that held on the 12th, preceding the date of this letter, or on the 13th, preceding the date of this letter? A. Preceding the date of that letter.

Mr. STONEMAN.—That is all, I think.

(Witness excused.)

Mr. STONEMAN.—The plaintiff rests.

Mr. SEABURY.—If your Honor please, is it desirable that the jury should be excused while motion for direction is made? I don't think I care to be heard at length in support of the application.

The COURT.—You may be heard a few minutes.

Gentlemen of the Jury, you will be excused until two o'clock. In the meantime, you will follow the in-

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structions I have heretofore given you. The jury  
then withdrew.

Be it further remembered that thereupon the following proceedings were had herein:

Mr. SEABURY.—If your Honor please, I move, on behalf of the defendant, for a directed verdict in favor of the defendant and against the plaintiff; that the plaintiff take nothing by this [177] action against the defendant, on the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action against the defendant, particularly upon the ground that there is evidence in the record which would tend to indicate that the plaintiff is not the real party in interest, it appearing that the plaintiff has sold and assigned the entire subject matter of the contract to Clay-Robinson Company, which fact indisputably appears by Defendant's Exhibit "O"; particularly also upon the further ground that it now appears from the evidence of the plaintiff that the contract which is the subject of suit in this action was in reality modified and changed by the making of an entirely new contract between this plaintiff and the defendant company on or about the 12th, 13th or 14th of May, 1913, at the city of Nogales; and that the contract which was then made between the plaintiff and the defendant is not the contract which is now the subject of suit in this action. In consequence of which there can be no recovery on the contract which is the subject of suit in this action.

(Then ensued argument on said motion.)



The COURT.—I will rule on the motion at two o'clock.

(Adjournment until two o'clock P. M.

(After recess.)

The COURT.—The motion made by defendant for a directed verdict in its favor is denied.

Mr. SEABURY.—The defendant excepts to the denial of the motion upon each of the grounds urged.

At 2:00 P. M., both parties being present, the plaintiff in person and by his counsel and the defendant by its counsel, the jurors returned into court, and thereupon the following further proceedings were had herein, to wit:

#### DEFENSE OPENS.

#### [Testimony of W. Beckford Kibbey, for Defendant.]

W. BECKFORD KIBBEY, called as a witness on behalf of the defendant, [178] having been previously sworn, testified as follows:

#### Direct Examination.

(By Mr. SEABURY.)

My name is William Beckford Kibbey, Jr. I am a cattleman. I have been engaged with the Alamo Cattle Company for about a little over six years. Prior to that time I had some experience buying cattle for butcher shops. I am president of the Alamo Cattle Company. Mr. Elias and I are practically its joint owners. Mr. Elias and I are the only people who have authority to make contracts for and on behalf of the Alamo Cattle Company.

I know Mr. Hall, Mr. Ed. Myers and Mr. Oliver.

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(Testimony of W. Beckford Kibbey.)

I have been engaged for six years in the purchase and sale of Mexican cattle, and am familiar with them.

I signed the contract, Plaintiff's Exhibit "A" in this case, between the Alamo Cattle Company and Mr. E. W. Myers. We bought large numbers of cattle to comply with this contract. We made arrangements with numbers of people whose cattle we sold, as a general thing, on commission to put their cattle into these herds, and we advanced money on their contracts which were to be delivered later. I recall an occasion about the 6th of April, 1913, at which some of the persons representing Mr. Hall were present at our ranches in Mexico. Mr. Johnston, Mr. Elias and myself were present. In addition to that Mr. Johnston had another man with him whom he represented to be some one who was to buy the cattle from him as I recollect, but his name I don't recall. Mr. Oliver was also present at that time.

We left Magdalena and went out to one of our ranches named La Moraga. Mr. Oliver stated he was in a hurry to see the cattle and for us to have a rig rented, which we did and we went out to our corrals and saw a number of our cattle come in to water, and in addition to that we sent out a lot of cowboys to round up a lot of cattle that when rounded up consisted of a thousand head [179] or so. These cattle consisted of two year olds, one year old steers, such as the cowboys could gather. No effort was made to get in the exact cattle to comply with the contract.

(Testimony of W. Beckford Kibbey.)

Mr. Oliver accompanied by Mr. Johnston and the other gentleman and Mr. Elias and myself drove out there and examined the cattle. We got on horses and rode through the herd, and some of us rode through the herd twice and we pointed out to them such cattle as we considered came under the contract. In addition to that, wild cattle were coming to water and we also pointed out such cattle as we considered came under the contract, and, in traveling around the ranch, such cattle as we ran across we also pointed out to them as coming under the terms of the contract.

Mr. Oliver said practically nothing himself. He did state, however, that he wished to receive these cattle later than we had intended to deliver them, and he stated that if he would defer deliveries of these cattle until May that he would extend the time of our contract for thirty days more. He asked us at that time if we were in position to deliver a thousand head of four year old steers. We stated that we would prefer to reserve that until the last delivery, as in the herd we were buying we were separating all four year old steers for them. And we stated that we were ready at once to deliver a herd of two year old steers and he stated that feed was too short at that time, and he preferred not to receive them then. He said he would notify us as soon as possible as to when he would be ready to receive the two year olds. After April 6th I next did something with reference to supplying cattle under the contract, Plaintiff's Exhibit "A." About the 9th of May, 1913. After we



(Testimony of W. Beckford Kibbey.)

had received due notice from Mr. Oliver that he wanted a herd of cattle ready about May 10th, and having advised him that the herd would be ready to cut on May 9th, Mr. Oliver arrived at Nogales, to the best of my recollection, on the 9th of May, accompanied by Mr. Johnston, [180] and he was also accompanied by Mr. Howe, I think the name was, a shipper for Mr. Hall. Mr. Johnston was also present. These gentlemen, accompanied by myself, and a man from Imperial Valley named William Farr, went to Distillidero for the purpose of examining the herd of cattle we had gathered. Of this herd about 800 had been set aside for Mr. Farr. We asked Mr. Oliver on his arrival if he cared to receive the four year old steers that were in the herd that we were about to offer to Mr. Farr. We asked Mr. Oliver whether he had any objection to our selling this herd of cattle which consisted of about 800 head of three and four year old steers, of which the majority were four year old steers, to Mr. William Farr. Mr. Oliver then asked me whether we would have sufficient four year old steers at the end of the season to complete our contract for four year old steers, and I said I thought we would. He said, "In that case, I have no objection to your selling these cattle to Mr. Farr." We then told Mr. Farr he could have the cattle. Whereupon Mr. Farr went into the herd and cut 560 head of three and four year old steers which he received and shipped to Imperial Valley. The remainder of the herd, consisting of about 1400 head was then tendered to Mr. Oliver. Mr. Oliver and

(Testimony of W. Beckford Kibbey.)

also Mr. Johnston rode through the herd. Originally, I went over to see about Mr. Farr's cutting the herd so that Mr. Oliver and Mr. Johnston had already examined the herd. When I returned, I asked Mr. Johnston what he thought of the herd. He stated that he thought there was a good many short ages in the herd. I explained to him that at that time of the year there practically could be no short ages among cattle that was supposed to be two years old, owing to the fact that calves are born much earlier in Sonora than they are in the United States or especially in Colorado. That, practically, the entire calf crop is born before the 13th of May, I should say probably three-fourths of the entire crop is born after the 13th of May, [181] each year, and I told him it was practically impossible that there could be any great number of short two year old steers in the herd for that reason. He then stated that the cattle were sore-footed. I replied that I thought he was mistaken about that, simply because the cattle were very tame and a great many of them were lying down. I explained to him that the fact that they were lying down did not mean that they were sore-footed, but merely tame. About that time Mr. Oliver came up and joined us and I asked Mr. Oliver if he didn't think that the herd was all right, and he told Mr. Johnston that he thought the herd would be all right and would ship all right. The principal objection that Mr. Johnston seemed to make to the cattle was that they were sore-footed and would not ship. Mr. Oliver stated that he



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(Testimony of W. Beckford Kibbey.)  
thought they would ship.

At that time Mr. Oliver made no objection to the cattle. Later on Mr. Oliver, possibly half an hour after this had occurred, Mr. Oliver took me to one side and told me that he didn't think that the cattle came up to the contract and he asked what we had better do about the matter. I told him that I thought that the cattle complied with the contract in every way and he suggested that we go to town and discuss the matter there. We thereupon got into automobiles and went back to town. A minute before we left the Distillidero Ranch, Mr. Elias, and to the best of my recollection, Mr. Tankersley, had arrived in another automobile from Magdalena, so that Mr. Elias also conferred with Mr. Oliver on this trip. On our arrival at Nogales, Mr. Oliver stated that he had to go to Tucson in order to meet another man he expected there. That if Mr. Johnston didn't take the cattle that he had a man from New York who would take them. He asked us to hold the herd for three days until he could decide on the man.

Mr. Oliver stated that it would be very much preferable, in [182] view of the contract which they had to deliver these cattle in large bunches and if we could deliver two thousand or twenty-five hundred head of cattle about the 25th of the month. I said that I believed we could do it, but I referred Mr. Oliver to Mr. Elias, who had entire charge of our cattle sales, and Mr. Elias buys and sells all cattle for the company. I merely assist him occasionally in this business. To the best of my recollec-



(Testimony of W. Beckford Kibbey.)

tion that is all that was said with reference to the order for 2500 head of cattle about May 25th. The matter was left in the air. Mr. Oliver stated that he was going to Tucson and would let us know further exactly what to expect and asked us to let the cattle to run. I agreed to do this. Instead of returning Mr. Oliver sent me a telegram or sent the Alamo Cattle Company, I am not positive which, a telegram, in which he stated that he was going to El Paso and would advise us fully further. On receipt of this telegram, we didn't know what to do with the cattle. Mr. Oliver hadn't definitely turned them down, but had simply asked us to hold them, so we continued to hold them. The next notice we had was a telegram from Mr. Hall, dated, to the best of my recollection, about the 11th of May, stating that he would arrive in Nogales about the 12th, I think, in order to receive any cattle that complied with the contract. Mr. Hall duly arrived about the 12th of May and he went out to the Distillidero Ranch. At that time *there with him* a Mr. Gillespie, Mr. Elias and Mr. Myers. I was thinking that Mr. Tankersley was with them, but I am not positive. I wasn't present. I didn't go out to the ranch on the 13th. To the best of my recollection I went out neither on the 12th or the 13th. I wasn't present at any time that Mr. Hall saw the cattle. Mr. Oliver was present on the 12th or 13th. I had a conversation with both Mr. Hall and Mr. Oliver about the 12th or 13th of May, the day that they returned from the Distillidero Ranch. It was [183] after they had inspected

(Testimony of W. Beckford Kibbey.)

the cattle. Mr. Elias was present part of the time. Mr. Oliver and Mr. Hall were present, to the best of my recollection, all the time and I was present all the time. We discussed the question of whether or not we could come to some agreement regarding the delivery of these cattle. I stated that I believe the cattle came up to the contract in every way, but I stated, we had never had any trouble with any of our buyers up to that time and we preferred to waive our rights rather than have any. I stated that furthermore that Mr. Oliver and I had been personal friends for a good many years and I particularly did not want to get into any trouble with him. I told them first that if they would let us have half the deposit, \$5,000, we would return them the balance. They objected to this. Finally, on Mr. Oliver's solicitation, I said that I would cut that down to \$4,000 and we would return them \$6,000. I stated, however, that it would be impossible for us to pay that amount of money to them until such time as we had realized on one of these herds, because all our ready cash was tied up in cattle and we were depending on this herd of cattle we had already bought for money to really pay for other herds we had contracted for at a low rate and we were short of ready money. Mr. Oliver then made the suggestion if we would deliver them one thousand head of three and four year old steers in the fall at \$32 a head, that in that way we would get \$4000 over and above the contract price that we had sold them for—four year old steers at that time, and he asked me whether that would be satisfactory



(Testimony of W. Beckford Kibbey.)

or not. I told Mr. Oliver that it was absolutely impossible for me to make any arrangement, unless I consulted Mr. Myers, because Mr. Myers I considered was a party in these contracts and his interests had to be taken care of. I told him, however, I would speak to Mr. Myers and get his decision. I then went downstairs and asked Mr. Myers to come up with me, so we could thrash the whole matter [184] out between the whole lot of us.

I said, "Gentlemen, in this proposition we want all the cards on the table. Anything I want to say, I want to say before you all." I then outlined the proposition that Mr. Oliver and Mr. Hall had made me in regard to these cattle and I asked whether it was satisfactory to all present. There was nothing said by Mr. Oliver or Mr. Hall. Mr. Myers stated he would have to talk the matter over with his partner, Mr. Tankersley, and would be unable to give us his decision at that time. Mr. Myers then left the room. The only thing that was then done was that I agreed with Mr. Oliver and Mr. Hall was to go to Tucson—they stated they had to go to Tucson that night and they asked me to let them know what Mr. Myer's decision was as soon as I got it. That same evening after Mr. Oliver and Mr. Hall left on the train I wired them.

Q. I now show you what purports to be a telegram, dated May 13, 1913, addressed to K. D. Oliver, at El Paso and purporting to be signed by the Alamo Cattle Company, by Kibbey, President. (Defendant's 8 for identification.)



(Testimony of W. Beckford Kibbey.)

A. That is the telegram that I sent.

Mr. SEABURY.—Now, I offer that in evidence.

Received in evidence and marked Defendant's Exhibit 8.

Mr. SEABURY.—(Reads exhibit to the jury as follows:) "K. D. Oliver, Nogales, May 13th, via Tucson, Az., May 14th,"—whatever that means,— "K. D. Oliver, El Paso, Texas. Myers refuses to compromise. Advise if you wish to go ahead with our verbal agreement. Alamo Cattle Company, Kibbey, President."

I did not receive any communciation from Mr. Oliver or Mr. Hall in response to that. No direct response at least. Merely, the other letters offered here, other letters and telegrams offered here in evidence that were received. It's a question as to whether they relate to this subject or not. I received no [185] response to this telegram. This telegram was ignored, as far as I know. There was another telegram received from them to the best of my recollection about the 14th, stating they were ready and willing to receive all cattle that came under the contract between the 29th of May and the 1st of June. That telegram was received by us after they had left Nogales on the 13th of May or 14th. I have told you the more important points of the conversation on the 13th with Mr. Hall and Mr. Oliver. The conversation lasted for nearly a day and a half. There may be other matters that I don't recollect just at the present time. I have given you the gist of the matter. It is my recollection of the matter that on

(Testimony of W. Beckford Kibbey.)

the 9th, Mr. Oliver in the presence of Mr. Johnston said that the cattle were up to the contract. But later he took me aside and said they were not up to the contract. He was endeavoring to sell the cattle to Mr. Johnston in the first instance. When Mr. Oliver took me aside and told me he didn't think the cattle were up to the contract, I said the cattle were up to the contract. It is not true, as stated by Mr. Oliver here on the stand yesterday, that when he told me privately that the cattle were not up to the contract that I agreed with him finally and said that they were not up to the contract. I told him exactly what I said I detailed to Mr. Johnston, repeated the same arguments regarding the cattle to Mr. Oliver that I did to Mr. Johnston previously. I did not at that time or any other say to Mr. Oliver or Mr. Hall in substance that the cattle which we offered to these gentlemen on the 13th of May were not up to the requirements of your contract with Mr. Hall. They stated that there were too many short ages among them; they stated that a large number of the cattle were sore-footed. Those were the only objections that I recollect. I participated in counting the herd I offered to these gentlemen on the 13th of May. There were almost exactly two thousand three hundred head of cattle in the entire lot. Of this entire lot, between 700 and 800 [186] head were offered to Mr. William Farr. He took 690 head and cut back 135 head. I have a distinct recollection of that. That would leave something over 1400 head of cattle left in the herd that was offered to Mr. Oliver on that



(Testimony of W. Beckford Kibbey.)

day. In my opinion as a cattleman there unquestionably was a train-load in the herd presented to Mr. Oliver on May 9th. There was in my opinion unquestionably a train-load of cattle that would come under the terms of the contract, ready for delivery at the Distillidero Ranch on May 9th. A train-load of cattle is from 15 to 20 cars or anywhere up to 45 cars, as far as that is concerned, of cattle. A train-load is usually considered by its minimum number, which is 15 cars, which means 15, 36-foot cars ordinarily. The usual number of two year old steers that such a car would contain depends very largely on the flesh the animals are in and the time of year. Two year olds are considerably bigger just before they are three's, than when they are three's, but the cattle we have described at that time of the year, carload should be 40 to 42 head to the car. Fifteen cars at 42 would be a little over 600 head, say between six and seven hundred head, to be safe. I can't say that I observed any runts among these cattle that I offered to Mr. Hall on the 9th of May. It is always a matter of opinion as to what constitutes a runt. There may have been a few stags. It is impossible to clean a herd absolutely *exactly*. That also is a question as to whether an animal is a stag or not is a matter of opinion. I did not observe any substantial number of either runts or stags. I think there were no cripples as far as I saw. I think there were no lump-jaws. As to sway-backs, that is also a matter of opinion, because it depends on how badly sway-back a steer is, whether a buyer will refuse



(Testimony of W. Beckford Kibbey.)

them. There might have been a few in the herd that would be considered sway-backs. I did not find any substantial number. I did not find any blind cattle. There were no cattle in that herd that were too thin to ship. As a matter of [187] fact, about ten days after the greater part of them were shipped to Canada. I mean to say there was something over four hundred head out of that herd, two year old steers shipped to Canada.

Mr. Oliver, Mr. Elias, Mr. Johnston, another gentleman, and I were present on April 6th at the inspection of these cattle. The cattle which we submitted to Mr. Oliver and Mr. Johnston on April 6th, 1913, we left on the ranch where they saw them until we received notice from Mr. Hall that they were ready to receive the cattle. We then gathered these cattle up and drove them to the Distillidero Ranch, where we placed them in the herd which they were to receive on May 9th. No cattle were cut out of that herd. No cattle were sold by us between the dates of April 6th and May 9th. It is a fact that the herd which I showed to the plaintiff and Mr. Oliver on the 9th of May comprised and included the cattle which were shown to Mr. Oliver and Mrs. Johnston on the 6th of April, 1913, with the possible exception of such cattle as we may have failed to round up which was a very small number if any. I counted the herd of cattle which I tendered to plaintiff on the 9th of May, 1913. It is a very difficult thing to say what percentage of a herd comes up to contract without actually cutting the cattle, but in my opinion I

(Testimony of W. Beckford Kibbey.)

should say that at least three-fourths of those cattle would come up to the contract.

I was present when Mr. Oliver was asked to cut the cattle. As near as I could make out, it wasn't Mr. Oliver who was cutting the cattle, but Mr. Johnston. I think I have said everything practically that was said about the cattle. Mr. Oliver endeavored to get Mr. Johnston to take the cattle at first and he stated there was no indifference on Mr. Oliver's part and said that he wouldn't take the cattle. He simply asked me to hold the cattle for three days, until he could bring another buyer out to see them. The question apparently wasn't whether or not the cattle was as good as the contract called for, but whether Mr. Johnston or whether [188] the other man he stated was in Tuscon would take them. I did not notice any substantial quantity of unmerchantable cattle in the herd of May 9th. The herd had already been cut and to the best of our knowledge and belief had been placed in condition. It had had a fifteen per cent cut before they were shown to Mr. Oliver and Mr. Johnston and a large number of unmerchantable and young cattle had already been cut out of this herd. After counting them I sent them out in one corner of our large pasture where they were just herded by about 20 cowboys until such time as we should hear further from Mr. Oliver on the subject. I received a telegram from Mr. Hall in which he stated he would be there, to the best of my recollection about the 12th of May. After Mr. Hall left Nogales about the 13th or 14th of May this took place there-



(Testimony of W. Beckford Kibbey.)

after between me and him. In the first place, we sent Mr. Hall a letter stating that his two herds had been tendered to him which he refused to receive, and we considered the contract canceled. To the best of my recollection, on the same date, we received a telegram from him stating he was ready and anxious to receive the cattle coming under the contract on the 29th of May, between the 29th of May and the 1st of June. Having notified Mr. Hall that we no longer considered the contract in force, we proceeded to sell these cattle. We sold a herd consisting of about one thousand head of cattle to Mr. T. J. Donohue. In that herd were about 750, I think the exact figure 733, head of two year old steers from this same herd. Of these about one-half of two year old steers and part of the three year old steers, 500 of them were shipped to Canada by Mr. Donohue. The price at which I sold this thousand head of cattle to Mr. Donohue was the same price as the contract, \$23 for two year old steers, to the best of my recollection. I am not positive whether we got \$28 or \$29 for the three and four year old steers. There were 733 head of two year old steers and there were something over 200 head of three [189] and four year old steers. There were, to the best of my recollection, about 960 head in the lot we sold Mr. Donohue.

Q. Now, for the purpose of fulfilling your contract with Mr. Hall, had you or had you not purchased and gathered approximately five thousand head of cattle?

Mr. STONEMAN.—We object to it as leading and suggestive.



(Testimony of W. Beckford Kibbey.)

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

Q. Tell us what you did with reference to the purchase and gathering of cattle for the performance of the contract with Mr. Hall.

Mr. STONEMAN.—I ask that the witness be confined to a time not other than has been already testified to. If he has made any endeavor to gather any other cattle.

Mr. SEABURY.—May I say, your Honor, that this is offered in support of our counterclaim. That is the purpose of it.

Mr. KNOLLENBERG.—If your Honor please, we object to the counsel introducing any evidence on the matter of his counterclaim, if that is the purpose of the question. According to the contract, or at least our view of the contract, which is admittedly made and executed by the defendant, the damages in that contract that there was a breach on our part has been liquidated and regardless of the damage which the defendants may have sustained by virtue of our breach of it, if we did breach it, have already been fixed by them, and they have made their bed and they must lie on it and therefore we object to counsel putting in any evidence to show any damages other than the damages that have been fixed in the contract.

Mr. SEABURY.—I direct your Honor's attention to a paragraph of this contract, which is the substance of the suit. Plaintiff's Exhibit "A," which says that: the seller hereby acknowledges receipt of ten thousand dollars, United States currency, in

(Testimony of W. Beckford Kibbey.)

hand paid [190] this day by the buyer, who agrees to pay the balance of the purchase money when said cattle are delivered on board cars, and failing to do so, he shall forfeit the amount or amounts advanced under this contract. I observe that there is a period at that place. There was not statement of any kind of limitation to the effect that in no event could the defendant in this case, namely, the seller, be prejudiced by a breach of contract in excess of ten thousand dollars. We think that the following clause is of a different character. The following is this: The seller agrees to pay two dollars in addition to returning the forfeit on each head he fails to deliver on this contract, which shall constitute an entire claim for damages. In other words, the limitation on the recovery in this section was placed not on the seller, but on the buyer; and it was expressly provided by the contract that in no event should the seller recover more than two dollars per head for each head of cattle that was undelivered under the contract, plus the return of the two dollars per head out of the ten thousand dollars already received. I think there is just that difference between the two clauses. By the contract it is expressly limited that the entire claims for damages, as the expression goes, so far as the buyer is concerned, but so far as the seller is concerned, there is nothing in the contract to limit him from recovering the actual damages sustained over and above the ten thousand dollars. At this time I would like to make this one other point, if the Court please, so that the Court may not misunderstand our posi-

(Testimony of W. Beckford Kibbey.)

tion. We claim that so far as the ten thousand dollars is concerned, we don't have to establish actual damages to entitle us to retain the ten thousand dollars under the contract. That was the sum which the plaintiff fixed and agreed should be held if he failed to perform. If the jury finds that he failed to perform without proof of actual damage, we claim to be entitled to retain the [191] ten thousand dollars. If we sustained actual damages, we claim the right to recover such excess over and above the ten thousand dollars as were actually sustained as damages by the defendant in this case, and not exceeding seventy-three hundred dollars in excess of the ten thousand dollars.

The COURT.—That amount, ten thousand dollars, is to be held in liquidation of damages suffered by the seller if the buyer fails to perform the contract?

Mr. SEABURY.—The object was to absolutely assure the defendant.

The COURT.—I think that the \$10,000 was in full of all liquidated damages and I sustain the objection.

Mr. SEABURY.—We except. For the purpose of hurrying the trial, if your Honor please, may I make an offer to prove the allegations contained in the counterclaim, to which this objection was made, which was what I was about to do? Counsel objects to any evidence under the counterclaim. (To counsel for the plaintiff:) Am I right?

Mr. KNOLLENBERG.—Any evidence in support of the counterclaim.

The COURT.—For the purpose of the record, is



(Testimony of W. Beckford Kibbey.)

that a formal introduction of evidence in support of that?

Mr. SEABURY.—There may be a question as to that, and in view of the undisputed fact that Mr. Knollenberg's objection was to all evidence offered in support of the counterclaim, I prefer to have a record which would protect the defendant in that respect.

The COURT.—All right.

Mr. SEABURY.—We now offer to prove in support of the counterclaim the allegations contained in that portion of the answer which I understand counsel for the plaintiff objects to upon the ground that it is inadmissible under the contract which is the subject of the suit.

Mr. KNOLLENBERG.—Upon the ground particularly that the basis of the counterclaim is the written contract, which provides [192] for liquidated damages, and which he admits in paragraph 14 of his amended answer are liquidated damages, and under the admission in paragraph 14 and the contract, there can be no recovery for any other damages.

The COURT.—Have you finished?

Mr. SEABURY.—Yes, your Honor.

The COURT.—Sustained.

Mr. SEABURY.—We except.

(By Mr. SEABURY.)

Q. Mr. Kibbey, I show you Plaintiff's Exhibit "A," and ask you to tell us in whose handwriting the body of that contract is.

(Testimony of W. Beckford Kibbey.)

A. My own. All the handwriting on that is my handwriting except the signature of Ed. W. Myers, and except the date.

Q. Will you tell whether or not any of the terms of the contract which appear to be in writing were so made at the suggestion of yourself or Mr. Myers?

Mr. KNOLLENBERG.—We object to the question. It makes no difference at whose suggestion it was made. It was made and the contract speaks for itself. It is agreed to by the parties to the contract, and by the pleadings. We are bound by our pleadings. They admit we are bound, and admit that they are bound, and it would make no difference who made the suggestion.

Mr. SEABURY.—I realize, your Honor, that one of the rules of construction upon which my friend has relied is that the instrument being in the handwriting of the defendant would be more strictly construed against that party. Now, if that is the case, I desire to examine this witness for the purpose of showing that the damages in this contract were made at the suggestion of the other party, namely, Mr. Myers, which would entirely dissipate that burden upon the defendant.

Mr. KNOLLENBERG.—I think counsel would be right, if he brings that knowledge home to the plaintiff, but if he does not, I think [193] we are bound by what the contract says, regardless of what Mr. Myers and Mr. Kibbey said outside. No verbal agreement made at the time or previous to this contract would vary or affect us in any respect, except,

(Testimony of W. Beckford Kibbey.)

of course, if they made a contemporaneous agreement that would also be a binding contract. That would change it.

Mr. SEABURY.—Of course, we don't wish to show modification of the agreement, your Honor. The rights of Mr. Hall can be no better than the rights of Mr. Myers, and in view of the rule of construction which has been urged against us, it seems to me we have a right to explain the circumstances under which the clauses were inserted, for the purpose of showing, if possible, that the responsibility and burden for these clauses did not necessarily rest with the defendant.

The COURT.—Well, I think, regardless of who may have written them or at whose suggestion they were incorporated in the contract, that the amount of damages which the defendant might recover was limited to ten thousand dollars. I sustain the objection.

Mr. SEABURY.—I except.

The cattle in the herd of May 9th were two year old steers. They were in a shipping condition, as we afterwards proved.

Mr. SEABURY.—I think that is all.

The COURT.—You may cross-examine.

Cross-examination.

(By Mr. STONEMAN.)

Q. You say they were in a shipping condition which you afterwards proved. How did you prove it?

A. By shipping over four hundred to Canada, and



(Testimony of W. Beckford Kibbey.)

four hundred to 'Omaha, and about four hundred to Denver. The herd was in two bunches, one bunch consisting of three and four year old steers, amounting to about seven hundred and fifty head, more or less, and the remainder of the [194] herd—the entire herd as counted afterwards amounted to two thousand three hundred, including the two herds, and of those there were about eight hundred and fifty head tendered to Mr. Farr, and about one hundred and thirty-five head were cut back. They were not put in the two year old herd, but were trimmed out. He cut those because he did not want them. I suppose there were some cattle he objected to. Some he thought were short ages—some cattle that did not exactly some under the contract. One hundred and thirty-five out of about eight hundred and fifty, more or less.

Q. You made two statements, Mr. Kibbey, as I recall your testimony, one to the effect that all cattle which you claim to have gathered and tendered on May 9th were two year olds and one to the effect that it was a mixed herd of two's and four's.

A. I explained it, I think, by the statement that the herd of twenty-three hundred in all consisted of two herds, one herd consisting of between eight and nine hundred head of three's and four's, and the balance were two year olds. I sold seven hundred of those to Mr. Farr, and claim to have had on hand about fourteen hundred for Oliver. That was the 9th of May. I claim that all the cattle I exhibited to Mr. Oliver on the 6th of April so far as I could

(Testimony of W. Beckford Kibbey.)

tell were included in the herd.

Q. How many of the cattle you claim to have submitted on the 6th of April, 1913, were included in the herd you submitted to Oliver on the 9th of May?

A. I cannot say just what proportion were two year old steers. In addition to that we gathered a herd consisting, to the best of my recollection, of about one thousand head of cattle, and of that one thousand head of cattle I should say on the mere estimate that there were about two hundred two year old steers. There were cattle and steers of various ages in this herd. It was on account or at request of Mr. Hall that we held six or seven hundred or even a thousand head of cattle [195] from the 6th of April until the 9th of May, 1913. We had those cattle on hand for sale. We had at that time over one hundred thousand acres of fenced land in Sonora, and it was customary for us to hold several thousand head from year to year. We had not gathered those cattle on the 6th of April for the purpose of making a tender of them to Hall under the contract. It is not true that the inspection of the cattle that was made on the 6th of April, 1913, was an inspection for the purpose of determining the grade and character of cattle which we would deliver at some future date under the contract. The original time when Mr. Oliver was shown these cattle was by Mr. Myers some time in January or February, and was a courtesy at this time for Mr. Hall to show his buyers what kind of cattle they were. It was not for the

(Testimony of W. Beckford Kibbey.)

purpose of compelling Hall to take up in train-load lots on the contract.

Q. So that there was no obligation, or do you claim there was any obligation on the part of Oliver or Hall at that time to accept any of the cattle gathered in April, 1913.

Mr. SEABURY.—We object to that, if your Honor please, as a question of law to be determined by the pleadings. We don't think it is proper cross-examination to ask the defendant what his position was.

The COURT.—Overruled.

Mr. SEABURY.—We except.

(Question read: So that there was no obligation, or do you claim there was any obligation on the part of Oliver or Hall at that time to accept any of the cattle gathered in April, 1913?)

A. In April or on April 6th?

(By Mr. STONEMAN.)

So far as my understanding of the matter is concerned, I understand that we were making no tender of cattle on April 6th.

Q. So that the only tender of cattle that you claim to have ever [196] made under this contract were cattle tendered by you on the 9th of May, is that true?

Mr. SEABURY.—The same objection.

The COURT.—Overruled.

Mr. SEABURY.—We except.

A. It is not. I, myself, know of a tender on the 13th of May. I was not present at this tender, but I know of it. There was a tender both on the 9th



(Testimony of W. Beckford Kibbey.)

and again on the 13th. I mean of the same cattle at both times, or practically the same.

(By Mr. STONEMAN.)

The cattle rounded up on the 6th of April formed part of the herd of May 9th. There had been a considerable cleaning up of that herd on May 9th. They comprised some of the same cattle that were offered for inspection of April 6th. There was no objection to those on April 6th. They were shown on the open range. I considered that those cattle were on May 9th cleaned up in the ordinary way in which cattle are usually tendered to a buyer.

Q. And yet out of the cattle which you say were tendered on May 9th, some other man—Farr—cut out one hundred and thirty-five because they were not satisfactory; is that true?

A. Yes, sir; out of about eight hundred head.

Mr. SEABURY.—We move to strike that because there is no evidence in this case as to what the contract was as to Mr. Farr. It might have been of an entirely different character from the privilege accorded to the plaintiff in this case to cut cattle. We move to strike it out as inadmissible.

Mr. STONEMAN.—If your Honor, please, this testimony is based upon the testimony of Mr. Kibbey.

The COURT.—Objection overruled.

Mr. SEABURY.—Except.

The COURT.—It was brought out by this witness the fact that Mr. [197]. Farr did cut so many cattle out of that herd, and he stated that he did so after a tender to Mr. Oliver.

(Testimony of W. Beckford Kibbey.)

(By Mr. STONEMAN.)

I recollect perfectly this telegram of May 13th, addressed to Oliver at El Paso, Texas, designated in this suit as Defendant's Exhibit 8. My recollection is that that telegram was sent about eight o'clock on the evening, just about two hours after Mr. Oliver and Mr. Hall had left for Tucson, and that telegram was sent to the Santa Rital Hotel, because Mr. Oliver said that they were going to stay there. I sent it to Tucson. I was advised the following day that Mr. Oliver had not been there that night and I was asked in another wire from the hotel what they should do, and I instructed them to forward to El Paso.

The mail gets out of Nogales about six o'clock in the evening. I wrote this letter, designated as Plaintiff's Exhibit "K," on the 13th, but I gave it to Mr. Barry and did not forward it until the next day. I handed it to Mr. Barry and asked his opinion. When I sent the telegram I had not written the letter. I wrote the letter on the 13th, but I don't recollect that I sent it—mailed it on the 13th. It seems to me that there is an error. When I say I did write the letter, I wish to say I signed the letter. To the best of my recollection, I explained the situation to Mr. Barry and asked him to write the letter. I did not sign it on the 13th to the best of my recollection. I think the first time I saw that letter was on the 14th. I did not know the contents of this letter on the 13th. I would like to make an explanation. Will you hear me on that point?

Mr. STONEMAN.—If the Court will permit.

(Testimony of W. Beckford Kibbey.)

The COURT.—Make your explanation in answer to questions.

The WITNESS.—Through this entire testimony we have always looked upon that delivery as being May 13th, and for that reason we have been speaking about the time Mr. Hall left and to the fact [198] that he stayed over the following day, which would make it May 14; yet we have Mr. Hall's telegram dated May 14th from El Paso. I am positive the dates are wrong, that Mr. Hall arrived at Nogales on the 12th of May and left on the 13th, and not on the 14th as stated prior.

I received a telegram on the 14th of May from J. G. Hall, which is designated in this case as Plaintiff's Exhibit "L." I sent the telegram to Mr. Oliver before I received the telegram from Mr. Hall. I received that telegram from Mr. Hall several hours after I had put this letter in the mail, but possibly before it left Nogales. To the best of my recollection, I mailed that the afternoon of the 14th. To the best of my recollection, I sent the first telegram to Mr. Oliver at Tucson the night of the 13th, and I received the telegram from Mr. Hall the afternoon or evening of the 14th. I think Mr. Hall has testified that he was in Nogales the 13th and 14th.

I never answered the telegram under date of May 14th, designated as Plaintiff's Exhibit "L." Because I considered the matter closed, as previously stated in the letter written the day before. I considered that that letter, being mailed the same day I received the telegram, was sufficient answer in it-



(Testimony of W. Beckford Kibbey.)

self. I did not tell Mr. Barry to hold the letter.

Q. To all intents and purposes, you intended to convey to Mr. Hall the information which was contained in that letter of that date?

A. On the 13th or 14th—I am not positive which.

Q. You intended to convey that information on the same day that the letter was written?

A. On the same day that the letter was signed.

On the 9th of May, 1913, I asked Mr. Oliver to cut some cattle which were under herd there for delivery under the contract.

Q. What did you mean by asking him to cut the cattle—to cut out the undesirables or cut out 15 per cent of the merchantable [199] cattle?

A. It was up to him to do the cutting. I tendered a herd I considered according to the contract. They had been cleaned up. If he had not cut very many more than fifteen per cent we would not have made any objection. We would have made no objection if he cut a few more. Upon the theory that they were all contract cattle.

Mr. Oliver did not tell me that the cattle were satisfactory. He told that to Johnston. He did not say they were satisfactory. He told Johnston he thought the cattle would ship all right, and did bring out the fact that the cattle were all right. I heard him make that statement to Mr. Johnston. He did not make the statement to me. He may have said more. But he did try to get Johnston to accept them. He did not tell me. I am telling you what of Mr. Oliver's conversation I heard. He did not tell me

(Testimony of W. Beckford Kibbey.)

that he would try to get Mr. Johnston to accept. He and Johnston were together in the herd riding around. A half hour afterwards when Johnston was not there he came out with the flat-footed statement that the cattle were not up to the contract cattle. We then went back to Nogales, and had our further conversation which is in evidence.

If they are tame, it is the usual thing for a large number of cattle in a bunch to be lying down if they are in good marketable, merchantable condition. They always lie down. They would be naturally lazy and when not worried by people moving around. Yes, we were moving around to a certain extent not the first time. They were up against the fence in the shade of a lot of oak trees. We were walking our horses through the herd. We were not going fast. They were examining the cattle slowly. They were riding through the herd trying to size it up. About twenty per cent that were near the trees were lying down. It is my experience that when cattle have been driven for days, that is what happens. I suppose the cattle having been driven for days prior had something [200] to do with their lying down although the cattle had been there for three days. I suppose they wanted to lie down because they wanted to get off their feet. It is quite probable that they wanted to ease their feet a little. They would have to be driven nine or ten miles to Nogales. I said they had been driven three or four days previously. That does not mean they had been driven three or four days continuously. I do agree with

(Testimony of W. Beckford Kibbey.)

witnesses for the plaintiff that cattle with tender feet could not be shipped, but any cattle that lie down is not the test. If it walks without limping that indicates that his feet are not tender. If he won't get up when you ride around, you ought to make him—ride up to him.

Q. Did you testify that the same cattle were tendered again on the 13th that were tendered on the 9th.

A. I was not present on the 13th—but shall I testify as to my knowledge or as to what I know more or less to be the fact? I only know it from the report of my foreman.

I sold to Farr on the 9th.

It is stated in the pleadings filed by the counsel on behalf of the Alamo Cattle Company that in the early part of April, 1913, the Alamo Cattle Company tendered to plaintiff one thousand head of the contract cattle. It is an error in the pleading. There is a misunderstanding. A herd was shown to Mr. Oliver on the 6th of April, but it was not tendered to Mr. Oliver formally. About one thousand head was shown to him. There was no formal tender, and they were not represented to be contract cattle. We pointed out samples, but there was no formal tender. The first formal tender was in May; that is my contention. I personally never made any tender of any cattle after the 9th of May. The company did on the 13th. After this tender had been refused I sent my letter and wrote the telegram on the 13th.

Q. It was not refused until the 14th?



(Testimony of W. Beckford Kibbey.)

A. That is where I [201] am telling you that you are mixed. Just look at the telegram of Mr. Hall's of the 14th from El Paso. How could he have been disputing with us on the 14th when he was sending the telegram from El Paso that day.

Mr. STONEMAN.—That is all.

Mr. SEABURY.—Q. When you say, Mr. Kibbey, that you did not make any tender of cattle to the plaintiff on April 6, did you or did you not express a willingness at that time to allow Mr. Hall to take those cattle if he saw fit to do so?

Mr. STONEMAN.—We object to the question, if your Honor please, unless it is shown that those were full contract cattle at that time, because it would have no bearing on this case so far as being a tender is concerned, unless they were contract cattle.

The COURT.—I don't know that it is material.

Mr. SEABURY.—That was a condition, we claim, if your Honor please, that was put into the contract for the benefit of the seller and not the buyer. If the parties were together and saw fit, from a practical point of view, to waive the provision as to notice—if one said, "Take the cattle," and the other said, "I don't want to," or "I don't care to"—I think it is competent to prove what took place there.

The COURT.—I think an offer on the part of the plaintiff to allow him to take them at that time—

Mr. SEABURY.—Before your Honor passes upon that question, may I direct your Honor's attention to the contract again? We claim, if your Honor please, and will subsequently ask your Honor to so construe

(Testimony of W. Beckford Kibbey.)

the contract, that this provision that the buyer was to give fifteen days' notice for each delivery during the months of April and May, 1913, contemplated more than one delivery, contemplated, we think, about five train-load deliveries, and that the completion of this contract was not in any way dependent [202] upon a prior notice. In other words, the plaintiff could not defeat this contract by refusing to notify them when they wanted the cattle. We think that the defendant would have had a perfect right during April and May to say, "We intend to deliver you a train-load lot of cattle on such and such a date," so we think the provision for fifteen days' notice was beneficial to the defendant. They had a right to disregard it if they saw fit. So if the defendant did in fact offer to deliver a train-load of cattle in April, that is a legal tender on that occasion. If the response to the offer was, "We don't care to take them now if it does not make any difference to you," and the defendant assented, that is a different proposition, but it will still show that he made a tender on that date. It is material under the pleadings.

The COURT.—I sustain the objection.

Mr. SEABURY.—Exception.

Q. Did you make any offer to deliver the cattle exhibited to Mr. Hall on April 6 at that time to Mr. Hall under this contract?

A. I told him that we would like to have him take a train of two year old steers at once. He said the grass was too short, and he could not take them until

(Testimony of W. Beckford Kibbey.)

later. Mr. Oliver said that, not Mr. Hall.

Q. Mr. Kibbey, prior to May 13, 1913, did the defendant company have in its possession ready for delivery to Mr. Hall four or five thousand two year old steers such as are mentioned in the contract?

A. At what time?

Q. Prior to May 13, 1913.

A. It did not have the entire number in its possession. It had never less than two train-loads, I should say. It is difficult to say exactly how many it had at that time. I should say it never had less than two thousand head in its possession at any time. It had those in its possession on May 6th.

Q. Prior to May 13, 1913, had you already made arrangements to [203] buy and gather cattle aggregating four or five thousand head of two year-old steers and two thousand head of four year old steers?

A. We had already bought and contracted for more than enough cattle to fill this contract. We were ready to deliver those cattle that we so gathered under this contract prior to May 13, 1913. We continued to be ready to perform that part of our contract until Mr. Hall refused to cut the cattle.

Q. Now, Mr. Kibbey, I direct your attention to the last clause of the contract, Plaintiff's Exhibit "A," where the contract says, "cattle to be cut Marago to Distillidero, to give fifteen days' notice for each delivery in train-load lots during April and May," and ask you to give such explanation as you can of the provision for the delivery in train-load



(Testimony of W. Beckford Kibbey.)

lots during April and May, 1913.

A. I believe that, owing to the fact that it states train-loads there, and the train-load is usually supposed to be anywhere from six hundred to fifteen hundred head of cattle, and, as a matter of fact, consists of something like a thousand head often, and the fact that there were about five thousand head to deliver, that we were to be allowed to deliver them at reasonable intervals during those two months. I expected that we would be able to deliver about the first of April, and had cattle ready to deliver about the first of April.

Q. I asked you whether, according to your understanding of the contract, that portion provided that you should deliver all the cattle called for in the contract at one delivery?

A. It most certainly did not.

Recross-examination.

(By Mr. STONEMAN.)

We often hold under herd at our ranch, the ranch where I say we held cattle to be delivered, as high as seven thousand head; we did not have seven thousand head in April; we had about three [204] thousand—oh, in April, pardon me, I think we are in error. The ranch that Mr. Hall saw the cattle on was not the same ranch that Mr. Oliver saw the cattle on on the 6th of April. We very rarely have less than three thousand head on the ranch where the cattle were seen on April 6th, that is the one you refer to?

Q. Yes.

(Testimony of W. Beckford Kibbey.)

A. On May 9th on a different ranch we had three thousand head.

Q. Belonging to the Alamo Cattle Company, all bought and paid for?

A. I would not swear that all of them were paid for; the majority of them were. The contract sets out the Alamo Cattle Company brand. We are accustomed to put that brand on them before they are shipped. But we frequently ship cattle without re-branding them, providing the owners are present and make no objection.

Q. Were you trying to get any cattle from Magdalena in April 1913?

A. Our ranch is in the Magdalena district. We had trouble in getting cattle in that month and that year in the Magdalena district to a certain extent. Because of revolutionary conditions, to the best of my recollection. It was not pretty nearly impossible to get cattle in the district of Magdalena, but it took longer than usual. Prices did not go up, they went down. The Constitutionalist government put the prohibitive export duty on cattle about two weeks after or a month after the United States removed the duty, which was, I think, September following that time. In April and May, 1913, there was no Mexican duty; there was a United States import duty, however. The strict quarantine against Mexican cattle on account of ticks and fever was removed in February.

Q. If that quarantine was removed in February, why did you write the letter to Mr. Oliver that I

(Testimony of W. Beckford Kibbey.)

hand you, provided you did write the letter?

A. I did write this letter; I recognize my own signature. [205]

Q. That is your signature?

A. Yes, it is my signature.

Mr. STONEMAN.—We now offer in evidence and ask that it be marked as plaintiff's exhibit under proper designation, this letter which I have just handed to the witness. We ask that it be marked Plaintiff's Exhibit "P." (The letter is so marked.)

Mr. SEABURY.—There is not objection to the letter, if your Honor please.

Mr. STONEMAN.—This letter which is identified as Plaintiff's Exhibit "P," I will read all of it; the part I am reading it for is the last part of the letter. (Reads the following to the jury:)

Nogales, Arizona, April 18, 1913.

Mr. K. D. Oliver,

304 American Bank Building,

El Paso, Texas.

Dear Sir:—

Enclosed please find copy of Dr. Bray's letter of the 9th instant.

You are thoroughly aware of just what Dr. Bray said in connection with the movement of cattle from points south of Magdalena.

During my last meeting with him, I asked him what would be his attitude in connection with the movement of cattle from points south of Magdalena, but from known clean territory. He stated that he would prefer to have me offer the matter to Dr.



(Testimony of W. Beckford Kibbey.)

Melvin, who was present. I then got out a map of Sonora, and pointed out the location of the Espinosa cattle, which are located practically due west of Carbo, and asked Dr. Melvin in Dr. Bray's presence, if I could move these cattle to my ranch, and export them safely, provided they did not come in contact with the Zepeda cattle. Dr. Melvin's reply was that he believed we would be perfectly safe in bringing cattle from known clean territory. [206]

In this letter of the 9th, Dr. Bray practically repudiates his verbal permission, given us at the El Paso meeting, and leaves the whole matter to Dr. Melvin to decide. We are writing to Dr. Melvin today, asking him to decide the question of the new quarantine line, and on receiving his reply, will advise you regarding his decision.

The question between Dr. Bray and ourselves is a very delicate one, and we do not feel at liberty to state exactly what we think about the stand taken by him. In our reply to his letter, we have simply written him that we note contents of his letter, and are forwarding letter to Dr. Melvin, a copy of which we inclose in Dr. Bray's letter.

We wish you would have a talk with him, and sound him diplomatically regarding what he expects to do in connection with our cattle, as it is of vital interest to us to know as soon as possible what to expect.

If we are unable to get cattle from south of Mag-

(Testimony of W. Beckford Kibbey.)

dalena it will complicate an already difficult situation.

Yours very truly,

WEST COAST CATTLE IMPORTERS'  
ASSOCIATION.

By W. BECKFORD KIBBEY, Jr.,

Secretary."

Redirect Examination.

(By Mr. SEABURY.)

The West Coast Cattle Importers' Association was an association formed by the various cattle dealers, of which Mr. Oliver was one, in an endeavor to handle the quarantine situation in a proper way, and to defend all our rights in case of any adverse rulings or anything of that kind. The name of K. D. Oliver, of El Paso, appears on this letter head under the hearing of "Executive Committee." When this letter was written Mr. Oliver was a member of the executive committee of the West Coast Cattle [207] Importers' Association. This letter was written by me as Secretary of the West Coast Cattle Importers' Association. It was written to Mr. Oliver not in regard to this contract, but between me and him, both as members of the West Coast Cattle Importers' Association. The difficulties I refer to in this letter of April 18th made it more difficult, but not impossible, to fulfill the contract sued upon. It did not make it impossible for me to have a sufficient number of cattle ready to fulfill the contract. It made it more difficult, but not impossible, it did not prevent us from being ready and able to make the delivery. As a matter

(Testimony of W. Beckford Kibbey.)

of fact, we exported considerably more than that amount.

*Redirect Examination.*

(By Mr. STONEMAN.)

Q. Nevertheless, it does furnish another reason in addition to that which you previously testified to as the only reason, why it was difficult to get cattle out of Magdalena.

A. We always had more or less quarantine troubles. I had forgotten there was anything more at that time. For five years it has been a fight with the United States authorities. It did furnish an additional reason why it was difficult to get cattle out of Magdalena.

*Redirect Examination.*

(By Mr. SEABURY.)

The quarantine referred to in my letter of April 18th was lifted after this letter was sent. It was lifted before May 13, 1913—to the best of my knowledge, it was lifted before that time.

**[Testimony of Ramon Elias, for Defendant.]**

Mr. RAMON ELIAS, being called as a witness on behalf of the defendant and being first duly sworn, testified as follows:

Mr. SEABURY.—If your Honor please, I am just informed that Dr. Kibbey was not sworn. If that is so, of course, it is an over-sight on the part of everybody, and I suggest that he be now sworn [208] to the same force and effect as though he had been sworn in the first place. I presume coun-



(Testimony of Ramon Elias.)

sel for the plaintiff will consent.

Mr. STONEMAN.—That is the most cheerful consent I have yet given.

The COURT.—Let the record show that he is sworn.

(The witness is sworn by the clerk, and in addition an oath is administered by the Court to the effect that he swears that the testimony that he has already given is the truth, the whole truth and nothing but the truth, and that all statements made during the course of his entire examination are now confirmed under oath, as true as though he had been sworn previously to testifying.)

Direct Examination.

(By Mr. SEABURY.)

My name is Ramon Elias. I am in the cattle business. I have been with the Alamo Cattle Company for the last six or seven years, and have been in the cattle business for myself or my father ever since I can remember. I should say that would be about twenty years. During that time I have been engaged in the purchase and selling of cattle in and about northern Sonora, Mexico, and in the United States.

I have seen Terrazas cattle in the market in El Paso—that is in the stock year, and seen it in Kansas City and Fort Worth. I don't know exactly how many, but I have seen different herds in two or three different cities, about a train-load or two at a time. The last time I saw them was a year ago last February. I have seen Terrazas cattle almost

(Testimony of Ramon Elias.)

every year in he last three years—four years. In train-load lots—a thousand or more. I have seen those practically every year I have been engaged in the business, except this last year. I am familiar with the quality of the Terrazas cattle. [209]

Mr. Kibbey and I are the owners of the Alamo Cattle Company.

I recall the making of the contract, Plaintiff's Exhibit "A" in this case, a contract between the Alamo Cattle Company and Mr. Myers, dated January 16, 1913.

The first time that I met Mr. Hall—not Mr. Hall but Mr. Oliver, the representative of Mr. Hall—was on or about the tenth or fifteenth of February 1913, if I am not mistaken, here in Tucson. He asked me about the cattle that we had sold to Myers. He told me that he was contemplating buying these cattle and I thought it would be all right. I said I did not have any objection, provided Mr. Myers wanted to sell it. I don't recollect anything else being said. We may have talked about something else. The next time I saw him was—I don't remember the date, but he was going down with Mr. Myers to the Moraga ranch to see the cattle we had sold Myers. The Moraga ranch is about 56 miles south of Nogales and twelve miles northwest of Magdalena. The Distilladero ranch is about nine miles from Nogales in a direct line.

The second time or the third time that I saw Mr. Oliver I saw him here in Tucson at the Santa Rita hotel. That was on or about the first or the latter

(Testimony of Ramon Elias.)

part of March, and he started to question me about the cattle. I told him I considered the cattle in pretty fair shape, and he said if it was—after I had a little conversation—if it was immaterial to us, to start making deliveries in May instead of April, as the contract called for, and I told him that provided he would extend the time until June to enable us to make this delivery, I didn't see any objection. We talked the thing up with Myers, and it was agreed that we should start in May instead of April.

I think Mr. Myers was present on that occasion. If he was not, we mentioned the matter to him.

I saw Mr. Oliver next and talked with him with reference to this [210] contract when he came down to Nogales with Mr. Johnston and another gentleman to look at the cattle that Mr. Myers had sold him, about the fifth or sixth of April. I went with them to Magdalena and from there to the Marroga ranch.

Mr. Oliver requested me to gather some of the cattle, or the steers, that were sold under this contract, in order to show them to Mr. Johnston and this other gentleman, whom they were trying to sell the cattle to. I told them I would do the best I could for them. I went out myself and got the men to gather the cattle, as many as I could, for them to see. Approximately a thousand head or more were gathered. I sent out the men and the cattle were driven from the mountains and held at a certain spot so they could be looked at. At



(Testimony of Ramon Elias.)

that time there was Mr. Oliver, Mr. Johnson, a gentleman that came with Mr. Johnson—I don't recollect his name—that Mr. Johnson told me was one of his buyers, Mr. Kibbey and myself. On that occasion Mr. Johnson—of course I represented the Alamo Cattle Company in all the deals, pretty near, buying and selling, and Mr. Johnston inquired of me what class of cattle we were going to deliver. I pointed them out and I expected to get out what we thought was a fair sample of the cattle we were to deliver, and I pointed them out to him, and after seeing the first herd, I asked him if he wanted to see more. He said that was sufficient; we could see more as we drove back to the house. At the house he told me that he thought he could handle the cattle and that was the end of that day. I think this did not take place in the presence of Mr. Oliver, because, as I remember, Mr. Johnston and myself were driving in a separate buggy with one seat. I was in the buggy with Mr. Johnston, all the time we drove out and saw the cattle and came back. I asked Mr. Oliver when he was there if he wanted any cattle right away. I didn't know whether he had them sold or wanted [211] the cattle right away for Mr. Johnston. He said that he did not care to receive them until May. I told him if he cared to receive them right away, we were ready to give him a train-load at any time he wanted them.

This herd which I gathered on April 6th, in my opinion, was as good or better than Terrazas cattle.

(Testimony of Ramon Elias.)

There was a sufficient number in that herd to constitute a train-load. A train-load comprises fifteen cars or more, as many as the railroad will handle. Between six hundred and twenty or thirty head up to a thousand or fifteen hundred could be placed in a train-load. The cattle which I spoke to Mr. Oliver about on April 6th were two year olds, fully two year olds. There may have been one or two, or eight or ten, that were not two year olds. Of course, in a big herd like that it is impossible to—I thought that you inquired of me whether I had reference to the cattle that were tendered to Mr. Oliver on the 9th.

Q. All my questions relate, Mr. Elias, to the cattle you showed on the 6th of April, and I would like you to confine your answers to the 6th of April for the present. Now, I would like to know approximately how many in the herd you spoke of on the 6th of April.

A. That is a hard thing to say, because in that ranch we keep yearlings, two's and three's, and we pointed out to them the ages of cattle and class of cattle in the contract. There may have been four or five hundred head, or three hundred head—I don't know.

Q. What did you say Mr. Oliver said with reference to those cattle, as samples of the kind of cattle you would subsequently deliver?

A. Mr. Oliver talked the matter over with Mr. Johnston, and Mr. Johnston agreed to take the cattle.

(Testimony of Ramon Elias.)

The cattle that I showed Mr. Oliver on April 6th were left in the pasture until we had notice of the date they wanted them. That was about fifteen or sixteen days before the 9th. It was [212] around the 20th we started our round-up in that ranch, and moved all the cattle that were supposed to come under this contract to the Distilladero ranch.

Between the 6th of April and the 9th of May, the defendant sold none of the cattle which I showed to Mr. Oliver on the 6th of April. On the 9th of May we delivered some to Mr. Farr—the big steers. Before the 9th we made no delivery.

Q. Approximately how many cattle did you offer to deliver to Mr. Hall on the 9th of May, and whereabouts?

A. I am positive about thirteen hundred head of two year old steers, and close to eight hundred head of big steers, at the Distilladero ranch. I saw Mr. Oliver at the Distilladero ranch on May 9th. Mr. Oliver was there in company with Mr. Johnston. A shipper—I don't remember his name—was there too. I went with them and I was with them for a little while. I left them to give my orders to the men to move the cattle so they could see them.

Mr. Kibbey was present. Mr. Tankersley was there as Mr. Myers had agreed that his representative be there.

I had a talk with Mr. Oliver with reference to Mr. Myers or Mr. Tankersley before the delivery of the cattle under the contract, exhibit "A." It was



(Testimony of Ramon Elias.)

agreed between myself, Mr. Oliver and Mr. Myers that one of them should be there.

Q. What, if anything, was said between you and Mr. Oliver with reference to what, if anything, Mr. Myers was going to do if he was present on these occasions?

Mr. STONEMAN.—We object to that question, if your Honor please, for the reason that it does not appear that what Mr. Myers was going to do was binding upon this plaintiff; that Mr. Myers was acting in any capacity that would bind the plaintiff. For that reason it is incompetent and irrelevant.

Mr. SEABURY.—I direct your Honor's attention to Plaintiff's Exhibit "B," the contract between Mr. Myers and Mr. Hall, which [213] is as follows: "It is also mutually understood and agreed that the said E. W. Myers or E. M. Tankersley, his agent, shall be on the ground at the time of delivery of all cattle, and aid and assist in receiving said cattle."

Mr. STONEMAN.—That does not change the contract at all in any way. If it is relevant at all, it is a matter personally between ourselves and Myers and Tankersley.

Mr. SEABURY.—We think it relevant, if your Honor please, to show what Mr. Tankersley's position was. It shows that either one of them was to be there and aid and assist Mr. Hall or his assigns in receiving the cattle.

The COURT.—What did you ask?

Mr. SEABURY.—What, if anything, was said

(Testimony of Ramon Elias.)

about the function to be performed by Myers or Tankersley on receiving these cattle.

The COURT.—The objection is sustained.

Mr. SEABURY.—Exception.

On the 9th of May when we arrived at the ranch where the cattle were being held,—the herd was held in two bunches, one consisting of big steers and another one consisting of two year olds—as soon as we came in there, Mr. Oliver asked me to let him have a couple of horses for him and Mr. Johnston to look over the herd, and I got the horses and turned them over, and went over about a quarter of a mile from where this herd was to see the big steers. When I came back from the big herd, they went over in one of the machines to where I was, and a gentleman by the name of Mr. Farr arrived in another machine that we had furnished, and Mr. Kibbey told me that Mr. Oliver did not care to take any of the big steers then. Mr. Oliver and Mr. Johnston were there. I asked Mr. Kibbey then if we could sell them to Mr. Farr, and he said yes, so I turned around and sold the big steers to Mr. Farr. Then I went with Mr. Oliver and Mr. Johnston to the herd of cattle where the small steers were. On the way back Mr. Johnston asked me how long a time [214] I would require to put up a thousand or twenty-five hundred head, because his buyer had to drive these cattle a good distance, and he did not care to make very many drives. I told Mr. Johnston that I did not care to put up more than a train-load at a time, and that was all for a while that was said between

(Testimony of Ramon Elias.)

him and me. After a while he came out and says, "I think these cattle are too thin to ship," and I asked him to go ahead and cut out what they didn't like. He just said that he thought he could not use them, and that was all.

That ended the conversation, so I says, "We will go back." Mr. Oliver told me, "Well, we will go into that"—that was when we went to get into the machines—"We will go to Nogales, and I wish you would hold these cattle for me three days until I can go to Tucson and find out whether the gentleman we are holding there will take the cattle or not. We will let you know further." I says, "All right." I held the cattle and Mr. Oliver did not show up until he came back with Mr. Hall. Two or three days after that, about the 12th—11th or 12th—I am not sure.

I heard Mr. Oliver say to Mr. Johnston that he thought these cattle would ship. I did not hear him say anything else. They were by themselves, riding around the herd, talking more to themselves than to us.

Q. Was the subject of the cattle you showed them on the 9th of May mentioned at any time?

Mr. STONEMAN.—We object to the question as leading and suggestive, and especially that the witness has already excluded references to any other conversations.

The COURT.—Objection sustained.

Mr. SEABURY.—Exception.

Q. My recollection is that Mr. Oliver testified on



(Testimony of Ramon Elias.)

the stand that he told you on May 9th that the cattle that you offered him [215] at that time were not as good as or better than Terrazas cattle.

A. There was no statement made absolutely about Terrazas cattle on that day. I am sure of that. In my opinion, the cattle which we offered to Mr. Oliver, or Mr. Hall, on May 9th were in reality better than Terrazas cattle. There were about thirteen hundred head of such two year olds. And close to 800 head of the other herd that was first offered to them. I considered there was a good train-load lot of cattle as good as Terrazas cattle. I did not notice among the herd any substantial number of runts, because I cut them cattle myself at the Moraga Ranch before they were sent to Distilladero and I made it a point to cut out all to my estimation that were runts. There may have been somebody's else's opinion brought up—I don't know. I use the expression "cut" in the sense of separating the steers that were supposed to be unmerchantable stuff or runts. That is the expression we use in cleaning the herd, it is cutting the unmerchantable cattle.

I noticed no sway-backs nor blinds. There may have been eight or ten head that might have got a little sore-footed from the drive we had to give the cattle from the Moraga Ranch to Distilladero. They arrived at Distilladero about the 5th of May. They were there in pasture until Mr. Oliver and Mr. Johnston came out to get them.

I did not notice among our herd any cattle which

were otherwise unmerchantable. After May 9th I was at the ranch again—I believe it was the 12th—with Mr. Hall and Mr. Oliver and another man; I believe it is Gillespie. I don't know the exact name. Mr. Johnston wasn't with us on that occasion. Mr. Myers was with me and Mr. Tankersley was with me on that same day. They were both there on the same day. Mr. Kibbey was not with us on the 12th. I came to go there on the 12th to inspect or to deliver to Mr. Hall the two year olds which they had asked us to hold [216] on the 9th until Mr. Oliver should come back with the expected buyer and instead of that he came back with Mr. Hall. I met Mr. Hall and Mr. Oliver on that occasion at Nogales. We had a couple of machines, as I recollect, some went in one machine and some in the other. Nothing took place that I can remember on the road until we got there. We got the men to gather the herd and I asked Mr. Hall to go ahead and cut the herd of cattle to satisfy himself. Well, they went in there and looked around for a little while and then he came out and he says, he started to tell me there was too many unmerchantable cattle, that they weren't cattle according to contract. At that time Mr. Myers was present and I told Mr. Myers—

Mr. STONEMAN.—We object to any conversation between this witness and Mr. Myers as not binding upon this plaintiff.

Mr. SEABURY.—In the presence of the plaintiff, if your Honor please, with reference to this very matter?

(Testimony of Ramon Elias.)

The COURT.—Well, I don't think any statement made by Myers would be binding on the plaintiff.

Mr. SEABURY.—Notwithstanding that Mr. Myers is the assignor of the plaintiff, if your Honor please?

The COURT.—Yes, notwithstanding that fact. After he sold this contract to the plaintiff and the plaintiff had assumed all the burden and was to reap all the benefits. I do not think that any statement made by Mr. Myers would be binding upon the plaintiff nor do I think that any construction that Mr. Myers may have placed upon the contract would be binding upon the plaintiff.

Mr. SEABURY.—Nor any admissions made by Mr. Myers?

The COURT.—Nor any admissions made by Mr. Myers.

Mr. SEABURY.—The objection is sustained.

The COURT.—Yes, I sustain the objection.

Mr. SEABURY.—May I except? May I also except to your Honor's construction of the matter with reference to any admissions made [217] by Mr. Myers with reference to this matter, as not being binding upon plaintiff?

The COURT.—Yes.

Mr. SEABURY.—May I ask whether this contract between Myers and Hall is in evidence—it is, is it not? Plaintiff's Exhibit "B."

Mr. STONEMAN.—Yes.

The COURT.—When I say that any admission made by Mr. Myers should not be received, I mean



(Testimony of Ramon Elias.)

any admission made by him after the assignment by him to Mr. Hall of the contract in question, not admissions made theretofore.

Mr. SEABURY.—May I still reserve my exception to your Honor's ruling as modified?

The COURT.—Yes.

Mr. SEABURY.—I do not wish to burden your Honor with it, but I wish to direct your Honor's attention to the part of the contract which makes Mr. Myers or Mr. Tankersley agent of Hall, for the very purpose of being there at that time.

The COURT.—The plaintiff has not objected to his being there. What they object to is the admissions or statements alleged to have been made by Mr. Myers.

Mr. STONEMAN.—If the Court please—

The COURT.—There is nothing before the court. I have ruled on the objection.

Mr. STONEMAN.—I don't like counsel's construction of the contract. It does not say what he says it does.

The COURT.—You gentlemen can argue that at another time.

Q. Mr. Elias, please tell us what, if anything, you said to Mr. Myers in the presence of Mr. Oliver or Mr. Hall on May 9th.

Mr. SEABURY.—I don't know whether that will be objected to or not. I want to give counsel ample opportunity to object if [218] they want to make an objection.

A. I must say that as Mr. Myers was the man or

(Testimony of Ramon Elias.)

conveyance to bring me Mr. Hall's statement that the cattle was not as good as the contract. I told Mr. Myers to get him and tell me which were not as good. Show me the cattle which were not according to contract, which he refused to do and says, "If he doesn't cut those cattle, I don't consider that he has any right or can say that he hasn't enough cattle for a train-load of cattle." Mr. Oliver was right close by on horseback. Mr. Oliver didn't say much. He was standing talking to Mr. Hall. Mr. Oliver never made any objections at all. Mr. Hall was the man making objection. After we got together, the same thing was repeated to me by Mr. Hall and I told them it was impossible that I considered no one could comment on any herd of cattle unless they had cut them to know positive whether there was a train-load of cattle or not, so we could argue the point on any steer he thought might be a bad steer and I thought might be a good one. I was present when Mr. Myers and Mr. Hall made a bet in regard to whether or not the cattle were two years old or not. There was a question asked by Mr. Myers to Mr. Hall when Mr. Hall was claiming there was a whole lot of yearlings there, so he asked him which is yearlings and he said "that one" and Mr. Myers says, "I bet five dollars that's a two year old." Mr. Hall accepted and we threw the steer down and looked at it and Mr. Hall lost the bet and Mr. Myers asked him if he wanted to point out any more, to make any more bets, and Mr. Hall said "No."

After that we got together again and Mr. Hall

(Testimony of Ramon Elias.)

started to tell me the same thing over and over that the cattle were not as good as the contract called for and I insisted that he cut out what he didn't think was according to contract, so we could dispute them, and he wouldn't do it, and then I asked him to show me what [219] cattle he expected to get, whereby he went out and cut out about twenty-five head of the white face, red and best colored steers to one side and he said, "That's the cattle I want," and I said to Mr. Hall, "There's no use to lose any more time. That's not the cattle I offered and we'll just let it go until we see Mr. Kibbey."

Mr. Hall just cut out about twenty-five or thirty head of the best produce steers there and he says to me, "That's the kind I want. Do you want to deliver me a train-load like that?" I said, "That's not the kind of cattle I offered in this contract and I don't blame you for wanting that kind of cattle."

He never made any attempt to cut out any runts or stags. We ended the argument right there and come back to Nogales. When I got back to Nogales I talked the matter over with Mr. Kibbey.

Recess until Thursday morning, 10:00 o'clock. Jury duly admonished as before and excused.

Thursday, May 28, 1914.

At 10:00 A. M. this day, both parties being present, the plaintiff in person and by his counsel and the defendant by its counsel, the jurors returned into court, and thereupon the following further proceedings were had herein, to wit:



(Testimony of Ramon Elias.)

(By Mr. SEABURY.)

I was starting to state that I took the matter up with my partner, Mr. Kibbey, and we talked the matter over between ourselves, and then I went home. After awhile I returned and met Mr. Oliver on the street right by the Montezuma, and Mr. Oliver asked me if there was no way we could fix this matter up. I said, "It is up to you to see what you want done in regard to the matter." This is in the evening of the 12th.

(By the COURT.)

Q. Was there any conversation after the 9th between you?

A. Not after the 9th, because Mr. Oliver told us on the 9th [220] that he would go to Tucson and come back and decide this matter. This conversation was on the 12th, in the afternoon after we returned. He asked me if there was no way to avoid trouble and I said: "It is up to you to state what you want done." Then he asked me if we would be satisfied if some good cow man would decide in regard to these cattle. I told him to name his man, and if I knew him, I would be very glad to take the matter up with him. Then he mentioned Mr. Bens Need's name. I said if Mr. Need would cut the cattle and decide whether they were as good as Terrazas cattle, I would be satisfied, and then he said: "I will let you know about it." After that I went home and Mr. Oliver and Mr. Hall and Mr. Kibbey had some conversation in the room.

(Testimony of Ramon Elias.)

(By Mr. SEABURY.)

I only heard part of that conversation when I came back. Mr. Oliver, Mr. Hall and Mr. Kibbey were present. I arrived there about the end of the conversation when Mr. Kibbey had told Mr. Hall that the best we would do would be to return one-half of the money in order to avoid any complications. I don't recollect anything more. I left. I had other business with other gentlemen, and I think I went out.

Q. Now, Mr. Hall testified the other day in substance as follows: "What was said between you and Mr. Elias at that time with reference to the grade of cattle?" Answer: "Well, when I first got to the herd, I asked him what he was doing with so many yearlings in the herd." Was anything said by him about the yearlings in the herd?

A. Right after Mr. Hall arrived there most of the conversation was had with Mr. Myers—not with me. He never mentioned anything to me about the yearlings.

Q. Then he goes on to say: "He said that they were sold to another party, and that whatever I cut out there that I didn't [221] want he was going to turn over to this other man and I called his attention to the fact that the herd was nearly half yearlings and that if I did go to work to trim on the cattle—I asked him why he didn't have his cattle that he was tendering me on the contract trimmed out where I could look at them." Do you recall any such statement as that?

A. I do not recall that Mr. Hall ever said anything

(Testimony of Ramon Elias.)

regarding that to me, but most he said to Myers, and Myers talked to me. I was up under a tree and they were in the herd. I was out of the herd altogether.

Q. Now, he said, page 18 of the testimony—it was asked, “What, if anything, did Mr. Elias say with reference to the cattle which at that time you testified you pointed out to him as not being as good as or better than Terrazas cattle?” Answer: “He said he had never seen the Terrazas cattle and wasn’t in a position to know.” Did you ever tell Mr. Hall that you had never seen Terrazas cattle?

A. I did not say that, because I guaranteed cattle as good as or better than Terrazas cattle.

Q. I asked you whether you did or did not make that statement. A. I did not.

Q. Now, Mr. Hall also said in response to this question, as follows: “Was there any further conversation between you and Mr. Elias with reference to these cattle at that time and place?” Answer: “Yes, sir.” Question: “State the further conversation.” Answer: “After I had cut out these thirty-five or forty head, Ramon came in and told me it was no use going any further that he couldn’t get a train-load of cattle out of there of that kind I was cutting.” I said, “I know that,” and I says, “What do you want to do about it?” “Well,” he says, “I don’t know what to do.” He says: “I can’t give you an answer until we go back to town and see Mr. Kibbey,”—What part of that conversation, if any, is a correct statement of [222] what took place at that time?

A. I think he has it turned the other way. I asked



(Testimony of Ramon Elias.)

what kind of cattle he expected to get, and showed samples of the kind he expected under the contract and he started to cut out, as I mentioned before, a number, and when he got about twenty-five or thirty I said that if that was the kind of cattle he wanted, and he said: "Yes," and I said, "I don't blame you, and I don't think we are obliged to deliver that kind. So there is no use to go any further."

Q. Mr. Hall also testified, Mr. Elias, that the herd was not put in shape that it should be in under the contract. He said in part that it consisted of fully forty per cent yearling steers, which he called Mr. Elias' attention to, and "he said very well; we are going to ship to someone else," and I said, "I am not going to trim your herd for you." Do you remember any such conversation?

A. No, sir; we never expected him to trim that herd for us. I trimmed the herd as I thought it ought to be under the contract. When this herd of May 12th and 13th was trimmed at first at Morego and Alamo ranches, as I always see to this work I went down and cut the cripples and blinds and all the sway-backs, and everything that I thought was unmerchantable. It was useless for me to ship any such stuff from the ranch because they had to travel two or three days, and it was useless to have any cripples in the herd because I knew they would be left in the road. We seldom have any cripples, as we buy most of our stuff, as I receive the best cattle I can get. I trimmed most of the yearlings. I left them at Distilladero. We had them sold to another

(Testimony of Ramon Elias.)

man. I may have left a few in the big herd of two thousand head. It is practically impossible for one man to go and cut out every one that is a yearling. I trimmed the herd I offered on May 9th. That was done the day Mr. Oliver was there, when we cut the big steers back. Then I cut the yearlings because we have this pasture at Distilladero and we [223] always hold a certain amount of cattle there, and I turned them loose in the big pasture. It took three days and a half to bring the cattle up to the ranch where they were exhibited on May 9th. They arrived about the 5th and they were exhibited on the 9th. In my opinion, that trip between the two ranches with five days apart, from the date of arrival and the date of starting from the ranch further south did not render the cattle unmerchantable on the 9th. We were in a position to deliver in May one thousand four year old cattle under this contract. I counted the number of cattle that were tendered on May 9th. There was, when we separated the big steers, approximately about eight hundred and thirty or forty big steers in the herd. I first counted the total, and then, when I separated the big steers, I counted eight hundred and thirty or forty head, and then counted the rest of the cattle and there was between fourteen and fifteen hundred head; and that is when I cut the younger stuff and threw them in the pasture. I did not count the ones I cut out, but it left between thirteen and fourteen hundred head in the herd. I was present at the time of the talk with Mr. Farr. Mr. Oliver was present when Mr.

(Testimony of Ramon Elias.)

Farr was cutting the cattle. I was present because I was making arrangements with Mr. Farr to take the cattle. I was making the arrangements in the presence of Mr. Oliver. I had made them and Mr. Johnston and Mr. Oliver were there.

Q. What did you say to Mr. Oliver with reference to the transactions?

A. I did not say much of anything of the contract, but I asked Mr. Johnston and Mr. Oliver how they liked that herd of steers and they said they looked all right. That was the cattle turned over to Mr. Farr. They were offered by Mr. Kibbey to Mr. Oliver before tendered to Farr.

Q. What else took place that you know of with reference to this matter, Mr. Elias, after May 13th and 12th? [224]

Mr. STONEMAN.—We object to anything that took place after May 13th, that being the date when the Alamo Cattle Company rescinded this contract and on their part terminated it.

The COURT.—Objection sustained.

Mr. SEABURY.—We except.

The freight rate was per head from Nogales to Denver in May, 1913, or thereabouts, approximately one hundred and forty dollars a car. Figuring feed and expenses, that would figure out almost four dollars a head. The cattle which I tendered to the plaintiff on May 9th I know were in shipping condition at that time. I base my answer on my experience for a good many years in shipping cattle and I have never pretended to deliver any herd not



(Testimony of Ramon Elias.)

in a shipping condition. In my experience I have handled a good many thousand head of cattle. That herd was in as good a shipping condition—part went as far as Canada, and as far as Denver, Colorado, after they were refused. I mean this same herd of May 9th and 13th. Close to five hundred head went to Canada. Approximately four hundred and sixty or seventy head went to Denver. The Canadian shipment was made to J. B. Jett and Company. The Denver shipment was sold to Donohue, and two herds sold to Tankersley, and one to a gentleman I don't recollect. These practically cleaned out the herd shown the plaintiff on the 9th and 13th of May.

I have sold Mr. Tankersley quite a number of cattle recently.

Q. I did not mean that. You know where Mr. Tankersley is now?

A. He started a train-load of cattle somewheres in Colorado.

Mr. STONEMAN.—We object to it as not responsive.

The COURT.—Strike the answer out as not responsive.

Mr. STONEMAN.—And we object to the question as irrelevant, incompetent and immaterial.

Mr. SEABURY.—The purpose, if your Honor please, is to explain the absence of Mr. Tankersley. It appears that Mr. Tankersley [225] is a material witness. We would be glad to have him here, but he is unfortunately in Colorado and not obtainable to us.

The COURT.—The objection has been withdrawn.

(Testimony of Ramon Elias.)

Mr. STONEMAN.—Yes.

(By Mr. SEABURY.)

Mr. Tankersley, I think, is close to Denver. I am not sure exactly where he is. We had a telegram, but I don't know where he is. He is out of Arizona. I understand that he left here on the 20th, early in the morning, and shipped some cattle from New Mexico. We have requested him to return here and he answered that he would like to be here if possible, but he was unable to sell his cattle and could not arrive in time.

Mr. SEABURY.—That is all.

Cross-examination.

(By Mr. STONEMAN.)

I tendered to Oliver on the 9th of May between thirteen and fourteen hundred head. I tendered on the 12th and 13th of May approximately the same number. I did not count them the second time. I was familiar with the cattle which were exhibited for inspection on the 6th of April.

Q. Mr. Kibbey has testified to the effect that the bunch of cattle that were tendered on the 9th of May were practically the same cattle as were gathered for inspection on the 6th of April, is that true?

A. That is the steers that were in the bunch. Of course, there were a good many cows and other cattle in the same herd that we showed as a sample.

All that could be gathered of the two's, three's and four's were included in the herd tendered on the 12th of May. I say, all that could be gathered, because on a ranch of fifty thousand acres you cannot gather

(Testimony of Ramon Elias.)

all the cattle you turn loose unless you run over five or six times. The cattle that I tendered on the 13th were practically the same cattle that were tendered on the 9th of May. [226] The biggest majority of the cattle that were tendered on the 9th of May was made up largely of the cattle that were exhibited for inspection on the 6th of April.

Q. Did you not request Mr. Oliver on the 9th of May, or did you not ask Mr. Oliver on the 9th of May, if he would not insist on delivery of the four year olds, that you would rather not deliver them, as you had the four year olds sold to some one else?

A. I did not. I did not say anything to Oliver myself, but I told Mr. Kibby to tender him the steers we had there on that date, and if he did not want them, to ask his permission for them to be sold to Mr. Farr. As a matter of fact, these steers were not sold to Mr. Farr at the time of the tender on the 9th of May. There was one hundred and fifty missing on the contract we had with Mr. Farr, and to make up this contract he was coming after that number. And he asked me if I could not deliver any more than the one hundred and fifty, and I told him, provided Mr. Oliver did not take the cattle we had there, he could have them. I did not say to Mr. Oliver that these four year olds were under contract, and it would be more convenient for us to deliver them later. I am positive about that. I did not have a word with Mr. Hall on the 9th. I never mentioned a word to Mr. Hall on the 12th. The second tender was made on the 12th, I think. My testimony refers



(Testimony of Ramon Elias.)

to the 13th—our conversation, not the tender of the cattle. The tender was made on the 12th. The cattle which I tendered on 12th in the amount of thirteen or fourteen hundred head were the only cattle that I tendered that day. I am practically sure it was not less than thirteen hundred or more than fourteen hundred head.

Q. I direct your attention to Plaintiff's Exhibit "K," being a letter addressed by the Alamo Cattle Company and signed by W. Beckford Kibbey, Jr., dated at Nogales, May 13th, and addressed to J. G. Hall, at El Paso, Texas, in which you make this statement: [227] (Reads:) "We beg to advise you that, owing to the fact that a herd of two year old steers was tendered to you on May 12th, consisting of 1,093 steers, from which we asked you to cut a train-load, but which cutting was refused after having come expressly for that purpose, after due notice, we consider that you have forfeited all interest in the contract and so advise you." How do you explain the discrepancy in the statement of the number of the herd and your testimony?

Mr. SEABURY.—We object to that, if your Honor please, upon the ground that the letter is signed by Mr. Kibbey and not Mr. Elias. The question is the discrepancy in his statement as to that.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

(By Mr. STONEMAN.)

I am testifying as an officer of the Alamo Cattle Company. I counted the cattle to be delivered on

(Testimony of Ramon Elias.)

the 9th, and I found that number in there. At Mr. Oliver's request I put about twenty men to watch those cattle. This amount we had left there—about thirteen or fourteen hundred head, and during the three days that they were out it is not impossible that some of those cattle might have gotten away, and when we left on the 12th for Nogales, I believe Mr. Kibbey had the herd counted over again, and it is possible that some cattle got away while they were watching the pasture.

All the cattle tendered on the 12th were contract cattle. That is my idea. I swore that is what I believe. I say, to my experience and my idea, they all were. I base that statement upon my long experience and the fact that I carefully cleaned up that herd myself. I don't recollect Mr. Kibbey's testimony yesterday in which he stated that twenty-five per cent were cut out of that bunch. I heard him say that twenty per cent were [228] lying down and would not get up when they were riding through the herd. That happens very often with our cattle. We generally cut them afoot, and don't use any horses. We had 2,300 head when we drove them cattle to that ranch, and we use a great many men. Those are generally needed on account of the amount of brush on the road. I testified that I had twenty men herding these cattle at the Distilladero ranch when they were tendered. We had the same number of men working for us until we got there with the cattle. The cattle were rounded up in a bunch while

(Testimony of Ramon Elias.)

they were being tendered under guard of twenty-five men probably.

Only Mr. Hall and Mr. Oliver were riding through that herd for the purpose of inspecting. Mr. Myers was afoot. Nobody was in the herd at the time when Mr. Hall and Mr. Oliver were there. The cattle that we sold Mr. Farr were the same cattle that we showed Mr. Oliver and Mr. Johnston. I don't know whether some of those cattle were the same cattle shown to Mr. Oliver when he went down there to look at the cattle before he bought the contract from Mr. Myers. I didn't show the cattle to Mr. Oliver. Mr. Myers did. The cattle were in two pastures. I testified that I superintended the gathering of them, buying and selling of them. That is a different thing from showing them to Mr. Oliver. I suppose the same cattle were offered for sale to Mr. Oliver that were in the Moraga pasture.

I made the contract with Mr. Farr for the sale of these four year olds, some time in January—I don't recollect. The cattle were to be delivered to Mr. Farr under that contract, in the month of March—most of them. I delivered some in the month of May, because there was 150 head there, as I say, of the other contract, and he was to take them whenever we could get them. Those cattle delivered to Mr. Farr were better than the Terrazas cattle. Some white faces, and red, and all good color.

I believe that the bunch of cattle tendered on the 12th were [229] all—pretty nearly all—two year olds. I don't claim that all were two year olds.



(Testimony of Ramon Elias.)

Q. Do you agree with Mr. Seabury that the only infallible test is to look at the teeth to see whether or not they are full two year olds?

A. It may be a man that has not been raised—has not had the experience in raising that kind of cattle; I can tell before looking at the teeth.

Q. Any good cattleman with the same experience that you have can tell the same thing, can't he?

A. It all depends upon whether he has been familiar with the cattle or not. I can pretty near claim that he is not a two year old without looking at the teeth. I would not deny that any other cattleman of equal experience could do the same.

I knew that under the contract I had to deliver full two year olds.

Q. And you took no other precaution for the purpose of determining whether all the cattle were full two year olds other than you testified to, did you?

A. I took the precaution to ask Mr. Hall to show me whether they were or not, and he wouldn't do it. He showed me one, and it was a two year old, and he wouldn't show me any more. I proved it was a two year old, by throwing him down and he had two big teeth.

Q. Didn't he point out six or seven of the others to Mr. Myers?

A. I don't know that he pointed out any to Mr. Myers. He should have pointed them out to me, not to Mr. Myers. This animal that I threw down was taken out of that herd.

Q. Do you mean to say that because that animal

(Testimony of Ramon Elias.)

was a full two year old, it must follow that your judgment was right, and that all the rest of them—

A. The argument was not with me; it was with Mr. Myers.

Q. Anyhow, you being under contract, the burden being upon the Alamo Cattle Company to deliver two year olds, before you could [230] ask Mr. Hall to accept, you had to tender full contract cattle?

Mr. SEABURY.—We object to the question on the grounds that it purports to state a question of law to the witness, and is otherwise incompetent and not proper cross-examination.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

Mr. STONEMAN.—I didn't specially cut out one by one and look at all those cattle, each individual head of cattle in the herd, on the 12th of May. I rode through that bunch of cattle for the purpose of examining them for ages. I was in the herd several times. Since about the 20th and 23d of April—several times after the 20th of April. I did not hold that herd together all the time. While they were gathering that herd, I was always looking at the cattle gathered. Gathered them and held them in the gathering pasture—every time we inspected them and threw them into that pasture.

I don't know how many were thrown into that pasture between the 22d of April and the 9th of May. I had 2,300 head, with the big steers.

Q. Each one of those was a full two year old?

(Testimony of Ramon Elias.)

A. I am not supposed to clean up a herd for somebody else.

Q. What do you mean by cleaning up a herd?

A. I am not supposed to deliver the other man just a two year old. It is up to him whether it is a two year old or not.

Q. Then, why don't you answer my question? I say, you are prepared to say they were all two year olds? A. I think they were.

I did not testify that I asked Mr. Oliver to cut some of the cattle. On the 9th of May, 1913, the cattle were there at the disposal of Mr. Oliver; he could have cut them or got another person to cut them. I mean by cutting, separating [231] the regular cattle or anything that he thought was not merchantable or might not ship. If the buyer thinks there are any unmerchantable cattle in the herd, it is his duty to show the seller where he is wrong or right.

Q. Did you consider it was your duty under the contract to deliver full contract cattle before the purchaser should exercise his opinion to cut back fifteen per cent?

A. I considered it was my duty to deliver cattle according to the contract.

I sold the Farr cattle on or about January—I don't recollect the date. I don't remember testifying yesterday that I did not sell Mr. Farr any cattle before the 9th of May, 1913. I think I was mistaken if I testified that I never sold any cattle before the 9th. I still insist that during all of the time that I



(Testimony of Ramon Elias.)

was down there, I heard absolutely no statement made concerning Terrazas cattle.

Q. Because no demand was made upon you that the cattle should be as good or better than Terrazas cattle, that would relieve you of the duty of tendering them, would it?

A. I consider they made no demand at all when they would not show me where I was wrong. Mr. Oliver may have showed me some, but he never showed that there was no train-load of cattle there that were not according to contract. I think that it was Mr. Hall's duty to prove to me that I didn't have a train-load of cattle according to contract.

I never delivered to Frank Clark any cattle which I had already tendered to Mr. Hall. I delivered yearlings to Mr. Clark. Yearlings not of the same bunch that were exhibited to Mr. Hall. They were not there in the Moraga pasture. They were shipped out of Magdalena and never driven there at all. At the Distilladero ranch on the 12th of May, 1913. Mr. Hall didn't say to me, "Why have you got so many yearlings in this bunch?" and I did not, in reply to that question, say that [232] "those yearlings are sold to somebody else." There might have been some yearlings in that bunch; I don't claim to say that every one was a full year old—or a full two year old—he had a right to cut them if they were. I don't consider an animal two years old a stag. There might be some stag steers, but I consider a stag a full four year old animal. There may

(Testimony of Ramon Elias.)

have been some stags in the bunch but I don't consider them stags.

There may have been a few that were pretty thin.

Q. If a stag is not a stag at two years old, how does he get to be a stag at four years old? They are trimmed at different ages.

These steers were most of them born along in February, March and April. After April up to about the 20th or 25th of May quite a lot are born.

Q. That being the case, doesn't a contract which compelled you to deliver full two year olds in April and May make a rather difficult contract to fulfill?

A. Well, I considered the same difficult for the man that is receiving, and for either one to show each other which is wrong.

Q. Nevertheless, it makes a difficult contract for you to fill, doesn't it?

A. Not necessarily, because we have always had enough cattle to deliver our contract, or more than enough. I tender to a purchaser what I think is right, to my own belief, and if I am satisfied with a customer, I lots of times let him cut out more than I am obliged to. I let him cut out more than fifteen per cent, lots of times. Even though I am satisfied that all the animals tendered are full contract cattle.

Q. Provided that the cut of fifteen per cent does not produce a bunch below a train-load?

A. The man that is buying the stuff may want less than I have.

I consider a train-load fifteen cars. I don't think I testified that I considered a train-load of cattle of

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(Testimony of Ramon Elias.)

Terrazas cattle a thousand head. [233]

Q. If you did, you would be again mistaken?

A. I think so.

Redirect Examination.

(By Mr. SEABURY.)

In my opinion all the way from 650 two year old steers to as many car-loads as they want to load after that constitute a train-load of cattle. 650 might be about fifteen cars. Fifteen cars is the least that the railroad will give you special service for. Most of the cars we load at Nogales, or wherever we load, are thirty-six foot cars. Special orders will bring forty foot cars.

Q. Mr. Elias, in your opinion, can you say whether or not a person who is familiar with American cattle could judge of the age of cattle to the extent of being able to say whether a steer is a two year old or not of Sonora, Mexican cattle?

Mr. STONEMAN.—We object, for the reason that it is not shown that the witness is qualified to testify as to American cattle, his testimony being confined to Mexican cattle.

The COURT.—The objection is sustained.

Mr. SEABURY.—Exception.

Q. Are you familiar with American cattle, Mr. Elias? A. I am.

Q. Now, Mr. Elias, Mr. Johnston testified yesterday, as I recall it, that he was familiar with the cattle and he could tell whether Sonora cattle were two years old or not. I ask you whether there is any substantial difference between two year old Sonora



(Testimony of Ramon Elias.)

cattle and two year old American cattle.

Mr. STONEMAN.—We object, for the reason that the witness is not properly qualified to testify as to two year old American cattle.

The COURT.—Two year old what?

Mr. STONEMAN.—American cattle.

The COURT.—Objection sustained.

Mr. SEABURY.—Exception.

I have raised two year old American steers myself. My father had [234] them ever since I can remember. I am familiar with two year old American cattle. There is quite a substantial difference between Sonora two year old and American two year old cattle. The biggest difference is the size of the animal. The American cattle, good cattle are always bigger, taller, heavier. At the same age they are a good deal bigger than Mexican cattle. From my experience with both Mexican and American cattle, I am able to say whether the ages of the Mexican cattle can be judged and determined by the same standard as American. It can never be determined by the size. The principal method of determination is by the horns, by the tail, or by the—so many natural things that to a man has been raised by the general appearance.

Recross-examination.

(By Mr. STONEMAN.)

Terrazas cattle are larger than some Mexican cattle because they have been bred up to American bulls. But they are not larger than our cattle. Our cattle have been bred up to American bulls too.

(Testimony of Ramon Elias.)

Q. Yesterday, did you not say in response to these questions: "I mean, during your experience as a cattleman, how frequently and in what numbers approximately have you seen Terrazas cattle?"

A. "Well, I saw it almost every year in the last three years—four years." Q. "In what quantities have you seen them each year, Mr. Elias?"

A. "Train-load lots." Q. "Does that mean a thousand or more?" A. "A thousand or more." Did you not testify that, in your opinion, a train-load lot was a thousand or more?

A. I testified that that was the amounts I had seen.

Q. Did you not define a train-load lot to be, in your opinion, a thousand or more?

A. I did not; no, sir. [235]

**[Testimony of Thomas J. Donohue, for Defendant.]**

Mr. THOMAS J. DONOHUE, being called as a witness on behalf of the defendant, and having been heretofore duly sworn, testified as follows:

Direct Examination.

(By Mr. SEABURY.)

My name is Thomas J. Donohue. I live at Omaha, Nebraska. I am in the cattle business. I have been in it all my life. I am thirty-seven. I have been engaged in the cattle business in South Dakota, Wyoming, Nebraska and I have cattle interests also in Sonora, Mexico, close to the line at Nogales. I know the brand of cattle known as Terrazas cattle. I have seen the Terrazas cattle for about the last ten

(Testimony of Thomas J. Donohue.)

years, and have handled a great many of them. I have seen them on the Terrazas ranch, and also seen them on the market after they were matured, in the north. I have seen them every spring on the ranch for the last six or seven years. I have ridden through the ranch and seen them on the range, and seen them in the El Paso yards and the Denver yards.

Q. What is your idea of what is understood by a train-load at Nogales and thereabouts?

A. I would call a train-load at Nogales or thereabouts of two year old Mexican steers of a grade as good as or better than Terrazas cattle from 500 to a thousand head, and have shipped as many as two thousand. I think the minimum is 500.

I know Mr. Kibbey and Mr. Elias.

I was in Sonora in May, 1913; I bought a herd of cattle from the Alamo Cattle Company about the middle of May, 1913. I bought 940 head of them. I know what cattle I bought. I bought 940 head of Mexican steers, two and three year olds. I think it was on May 20th. I examined these cattle before I bought them. I saw this herd of cattle about May 8th or 9th. They were at that time on the Distilladero Ranch, about nine or ten miles from [236] Nogales. They were not offered to me for sale at that time. I went out there and cut these cattle on the 20th. I had bought them at this time from Mr. Kibbey and I went out there to cut the cattle on this particular day and I cut them. I received 940 head.

In my opinion as an expert in Terrazas cattle and other cattle, the cattle which were delivered to me on



(Testimony of Thomas J. Donohue.)

or about the 20th of May by defendant were fully as good and probably better bred cattle than Terrazas cattle. If those cattle had not been in a merchantable condition at that time I wouldn't have received them. I shipped those cattle the second day after I purchased them. I made shipment about the 22d. I shipped 440 head of these cattle with another train of my own cattle and I sold 501—500 head to a gentleman from Canada. They were loaded for Canada on the 21st day of May. I couldn't tell you, sir, when they arrived in Canada, it would be about two weeks later. The balance of the shipment went to Range Junction, Wyoming and Edgemont, South Dakota. I don't know exactly how many of these particular cattle died in shipment because the shipment to South Dakota and Wyoming included not only part of the cattle I got from defendant, but another portion of cattle, and I don't know what actually died out of these two shipments. But I do know the total result. I lost 7 head out of a train-load of cattle, out of about 1500.

I saw the cattle at the ranch of the defendant on the 9th and 13th of May. I am familiar with the brand of those cattle. I know them by the general appearance of the herd of cattle. I saw some of the cattle, which were on the ranch of the defendant on the 9th and 13th days of May, subsequently in Denver. I think I saw them all. I saw all my cattle there. I shipped them to Denver. I first shipped to Denver, from Nogales. I didn't ship these cattle to Canada myself; I sold them in Nogales stock-

(Testimony of Thomas J. Donohue.)

yards. The cattle I sold in Nogales stockyards went to Denver. I didn't [237] see any of the ones I sold there. I just saw the ones I owned myself, 440 head. I took those myself to Denver. I had them at the Denver Union stockyards. I showed a few of those cattle to Mr. Johnston, the representative of Clay, Robinson & Co. I know Mr. Johnston. As I remember it Mr. Johnston looked me up there in the yards and asked me if I bought some of those cattle from the Alamo, and I told him I had. I believe I was talking with Mr. Stevens first, had some conversation with Mr. Stevens. Later Mr. Johnston looked me up and asked me if I had any of the cattle there with me and I said I had and took him down to the pens and showed him some of these cattle with the Alamo brand on. The way I remember it, Mr. Johnston said that if they looked that good to him, he would have bought them. We had some conversation there. I couldn't remember just all of it. I delivered all my cattle on the Denver market. I had previously sold part of them and sold part of them on the Denver market. I think I probably sold about a thousand head on the Denver market. I had 440 of those Alamo cattle in Denver.

Q. But confine yourself, please, to what you did with Alamo cattle.

A. I sold them. I had part of these cattle contracted before they went to Denver and part of them were sold on the Denver market. I am not able to state what part of the cattle that I bought from the Alamo I sold on the Denver market, because I had

(Testimony of Thomas J. Donohue.)

them mixed with other cattle.

I visited the Distilladero ranch with Mr. Kibbey on the 8th of May, 1913, and examined cattle there at that time. I think those cattle were the same cattle which I subsequently bought. There is no doubt whatever in my mind about it.

Cross-examination.

(By Mr. STONEMAN.)

I think I examined between 2000 and 2500 head at Distilladero Ranch on the 8th of May. I had no occasion to examine those [238] cattle between the 8th and the time I bought them which was about the 20th of May.

Mr. SEABURY.—Will you pardon an interruption? I don't recall whether I asked the question which I called this witness to establish. May I ask him?

The COURT.—Go ahead.

Mr. SEABURY.—Mr. Donohue, in your opinion as a man experienced in cattle, and particularly in Terrazas cattle, are you able to say whether or not, the cattle which you subsequently bought from the Alamo Cattle Company about the 20th of May and which you saw on the 9th and 13th of May, were or were not as good or better than Terrazas cattle?

A. I think they were fully as good or better.

(Mr. STONEMAN—Continuing.)

I paid \$23 a head for those cattle. I testified that on the 20th of May I bought 940 head. I also testified and swore that those were the same cattle I ex-



(Testimony of Thomas J. Donohue.)

amined on the 8th of May, to the best of my knowledge.

Q. Didn't you swear positively they were?

A. To the best of my knowledge I swore they were.

Q. You want to qualify your statement now by the further statement that it was only to the best of your knowledge?

A. I think if you will look over my statements you will find I said I had no reason to doubt they were the cattle. They looked like the cattle, they were branded the same, and as near as I could tell were the same cattle. I did not examine that herd of cattle by brand. I couldn't tell you whether they had earmarks. I didn't look to see whether they had earmarks or not. They were not distinct in color, size or ages, so I could positively identify them to that extent.

Q. All looked alike?

A. Yes, they are in size and quality and so forth.  
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Q. If these cattle were driven into a herd of 3,000 your intimate knowledge of these cattle based upon the reasons you have given, you could go into the herd and drive out these cattle?

A. I could if they were all branded different. I looked at most of these cattle. What cattle I did see were branded Alamo brand. I think all the cattle I bought at that time had the Alamo brand. I wouldn't swear to every head of them. I counted them in the stockyards when I bought them; received them in the stockyards. I counted them as we re-

(Testimony of Thomas J. Donohue.)

ceived them. My men tallied them in the cars through the chute. When I counted them I was not counting them for brands. Just counting for numbers for ages. We never buy them by ear-marks. Where these cattle were held from the 9th to the 20th of May is ordinary Mexican pasture. Comparing it with the feed on other parts of the ranch owned by the Alamo Cattle Company, I would say it was just a good deal like the rest of it. Well, none of that pasture is very good down there, only in the rainy season. At that time it was not very good, just ordinary condition for Mexican pasture. My contract called for two year, three year olds. I found some yearlings after we got to town.

Q. Out of the same bunch which you testified when you examined them on the 8th, were all as good or better than Terrazas cattle and full two's?

A. I didn't say they were full two's. When I cut the cattle at the Distilladero Ranch, I cut out some cattle. Cut back the usual percentage of undesirable cattle. They had sold some cattle previous to the ones I had received. When I first looked at this bunch of cattle there was about 2,000 head in the bunch. They sold some of the two and three year old steers out of there and cut back from the old steers were in these cattle when I came to receive them and I cut back what I wanted to. From the herd I bought from the Alamo Cattle Company on the 20th of May. When I went to receive them, the herd was, I judge, [240] about between 1250 and 1300 cattle in the herd. To the best of my knowledge

(Testimony of Thomas J. Donohue.)

that included the cattle that I saw on the 8th which were gathered for tender to Ha. I couldn't tell you exactly how many short ages I cut out. Altogether I cut out about 300 head, I should judge. I didn't count them. Leaving a balance of 940. There were 175 three year olds and up out of 940. I bought them for three years and up. There were quite a large percentage of four's. The steers I bought older than 2's I bought them for 3's and up so I didn't count them four's as I took them all at three years old. I cut back about 300 unmerchantable, short ages and cattle I didn't care to take, on my contract. To the best of my knowledge those were identically the same cattle which were tendered to Hall on the 9th.

Mr. STONEMAN.—That's all.

Redirect Examination.

(By Mr. SEABURY.)

These cut backs that I eliminated out of the herd were just as good as any of the cut backs out of the Terrazas cattle. In the cattle that I bought I did not find any runts. Out of the cattle that were tendered to me on the 20th, as I have explained, I cut back out of say approximately 300 cattle, I cut back about 300 cattle. Of those 300 cattle I cut back, they were undesirable cattle in my opinion, undesirable to me, might be blind, might be runt, might be sway-back or for some reason, I cut those cattle back. In the cattle that I examined on the 20th there were no substantial number of runts. There were no substantial number of stags, just about like there would



(Testimony of Thomas J. Donohue.)

be in an ordinary herd of cattle of that kind. No substantial number of cripples or lump-jaws, nor of sway-backs, nor of blind cattle. No extraordinary number of any of those classes. Nor cattle too thin to ship. Nor any extraordinary number of unmerchable cattle. [241] I was to have about a 15 per cent cut, I think, on that cattle. I don't believe I could say whether I cut more or less than 15 per cent. I cut the herd down until they stopped me and took 940 head. That's the way I usually cut cattle. No objection was raised to my cutting.

Q. How many full two year old steers were there in the herd?

Mr. STONEMAN.—We object to that as not proper redirect examination.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except. My recollection was, your Honor, that Mr. Stoneman asked some questions about the two year olds. Perhaps I should have gone into it on direct.

Mr. STONEMAN.—I asked him how many two's there were and he said there were none.

Mr. SEABURY.—I beg your pardon.

Q. You said in response to Mr. Stoneman's question, as I recall it, there were 175 three year old steers and up?

A. Yes, sir. There were 693 two year olds, as good or better than Terrazas cattle, in my opinion.

Mr. SEABURY.—That's all, Mr. Donohue.

(Testimony of Thomas J. Donohue.)

Recross-examination.

(By Mr. STONEMAN.)

I couldn't tell you the exact numbers of those two year olds that I loaded in these cars, but we usually load about 40 head of these cattle in a 36 foot car. Well, all the way from 15 36-foot cars make up a train-load. 15 would be a small train-load. I have gotten trains for ten and twelve cars. I say that I had 940 all together. I'll give you the exact figures. I've got them right here if you will write them down. 22 yearlings that we found in the yards after we got to town. 348 two year olds and 70 three's and up. 70 head of three year olds and up. And then the cattle that was to go to Canada was 385 head of two year olds, and 115 three's and up. These were all out of the same [242] cattle. You see I sold 175 head in Nogales. I am giving you the way I sold them and the ones I took to Denver myself. There were no other yearlings in the other shipment. There were 115 and 70 three's and up.

The COURT.—I understood you to say there were 175 three year olds and up. 620 two years old.

Mr. SEABURY.—However, his mistake is merely adding of the figures of his memorandum.

A. There were 115 in one bunch and 75 in another which made 185 instead of 175. I didn't count the ones I cut back; they were approximately 300. They were undesirable for various reasons. Probably some of them thin. I didn't notice any tender-

(Testimony of Thomas J. Donohue.)

footed. I had various reasons for cutting back each steer, I suppose.

Q. You were trying to cut cattle as good or a better grade than Terrazas cattle?

A. I was getting cattle that suited me for the price. I didn't have anything to do with Terrazas cattle at that time. There was nothing like that. If the cattle suited me it didn't make any difference whether they were as good or a better grade than Terrazas cattle.

Q. You didn't examine them for the purpose of determining whether they were as good or better, or look them over for general appearance?

A. Oh, yes, I examined them. I don't buy a herd of cattle without sizing them up.

Q. But if an animal looked good to you, it wouldn't make any difference if it was as good as Terrazas grade or not, provided it suited you?

A. That's what I was buying them for, if they were worth the money.

Redirect Examination.

(By Mr. SEABURY.)

The three hundred I stated I cut out included the 15% cut.

Recess until 1:30. Jury duly admonished and excused. [243]

At 1:30 P. M. this day, both parties being present, the plaintiff in person and by his counsel and the defendant by its counsel, the jurors returned into court and thereupon the following further proceedings were had herein, to wit:

Court convened at 1:30 P. M.



**[Testimony of Ben Sneed, for Defendant.]**

Mr. BEN SNEED, being called as a witness on behalf of the defendant, having been previously sworn, was examined and testified as follows:

**Direct Examination.**

(By Mr. SEABURY.)

My name is Ben Sneed. I reside in Douglas. I am in the cattle business. I have been engaged in it about thirty years, in Arizona and in Mexico, Sonora and part of Chihuahua. I bought cattle in Chihuahua and I bought them all over the northern part of Sonora. I know a brand of Mexican cattle called Terrazas cattle. In a general way, the Terrazas cattle are a little light-boned, and they don't weigh much. That is the opinion I always had of them. They are recognized as a brand of Mexican cattle. All the experience that ever I had with them is I seen them in the El Paso yards in El Paso, Texas. I haven't ever seen them on the ranges. I have seen five or six thousand head of Terrazas cattle in the El Paso yards from one time to another for the last three or four years. I have seen them three years old, and I seen a bunch there about a year and a half old; I seen two bunches. I think I am able to recognize Terrazas cattle when I see them. I saw a bunch of cattle what Mr. Donohue bought about May 20th, 1913, of the Alamo Cattle Company. I saw part of them in the pasture, at the Distilladero ranch, and the rest of them I saw when when the shipped them at Nogales. I think the cattle which I saw as having been bought by Mr.

(Testimony of Ben Sneed.)

Donohue at the time stated were just as good as or better than Terrazas cattle. That is my opinion. This fellow that bought them in Cananea, he asked me to go down there with [244] him and look them over. I went down with him and I looked around through them and came back. I don't think there were any stags in that bunch of cattle. There were no runts. I noticed no cripples. I noticed no lump-jaws. I noticed no sway-backs. I noticed no blind cattle. I did not inspect them that close. But there was none there. I did not notice any that were too thin to ship. I did not notice any that were unmerchantable. I would call them full age stuff. They were bought for twos, two year olds, and I would call them two year old steers.

Mr. SEABURY.—That is all.

Cross-examination.

(By Mr. STONEMAN.)

I saw no stags in the bunch that Donahue had at Nogales. I think it was on the 9th, wasn't it? I forget the date. There might have been some that looked a little staggy, but he had a right to cut them out. That is my construction of the contract. There might have been some that were under two's, and he had the same right to cut them out again. It wasn't the seller's fault. My designation of the grade of these cattle is based partly upon the fact that if there were any there the buyer had the right to cut them out.

Q. So there might have been some there, might there not? You testified, you know, that you did not

(Testimony of Ben Sneed.)

inspect them close enough to see whether there were any sway-backs or cripples or blinds.

A. Well, I did not see any.

Q. Well, I understood you to testify that you did not inspect them close enough for that.

A. Well, I looked at them pretty close, and I did not see no sway-backs. I walked through them.

Q. Walked through them. Would you be willing to swear unequivocally that all that bunch was full two year olds?

A. No, I would not. The general grade of Terrazas cattle show a predominant red color, almost all of them. [245]

Mr. STONEMAN.—That is all.

The COURT.—That is all, Mr. Sneed.

**[Testimony of A. M. Joffroy, for Defendant.]**

Mr. A. M. JOFFROY, being called as a witness on behalf of the defendant herein, having been previously sworn, was examined and testified as follows:

Direct Examination.

(By Mr. BARRY.)

My name is A. M. Joffroy. I am a stenographer employed by the Southern Pacific Company at Nogales, Arizona. I attend to correspondence and file it, that is all. I am familiar with the files of the Southern Pacific Company, at Nogales, Ariz.,—with reference to orders for cars for shipments out of Nogales, Arizona.

Q. I hand you a letter dated El Paso, Texas, April 28th, 1913, and ask you if that was received by the



(Testimony of A. M. Joffroy.)

Southern Pacific Company at Nogales, Arizona  
(handing paper to witness).

A. Yes, sir, it was.

Mr. BARRY.—That is Defendant's Exhibit 3, already admitted in evidence. This, Gentlemen, has already been read to the jury. It is addressed to the agent of the Southern Pacific Company, Nogales, Arizona. "Dear Sir: We are in receipt of a letter today from Mr. Kibbey in which he advises us that he placed a definite car order in our name for cars in which to load the first shipment of the cattle purchased from him. Under date of February 7th, we placed an order with you, our file No. 2, for 150 forty-foot Santa Fe cars, and the order that Mr. Kibbey has just placed is referring to this order. Will you kindly furnish us with information as to how many cars Mr. Kibbey has ordered and whether or not they are Santa Fe forty-foot cars. For your information, beg to state that we wish to order all of our cars to be forty-foot Santa Fe cars. Trusting to receive this [246] information from you by return mail, beg to remain, yours truly, K. D. Oliver, Manager."

I have got the file of the Southern Pacific Company with me.

Q. Now, here are three letters and telegrams. I will ask you if that is the complete file of the Southern Pacific Company in reference to stock order No. 10 for 150 forty-foot Santa Fe stock cars, ordered by K. D. Oliver to be loaded at Nogales, Arizona, during the months of April and May, 1913.

(Testimony of A. M. Joffroy.)

A. Yes, sir.

After the receipt of the letter of May 5th, 1913, from J. G. Hall, the Southern Pacific Company wired Tucson for placing an order for thirty-two cars.

I know whether the Southern Pacific had on hand on May 12th the thirty-two stock cars which had been ordered by K. D. Oliver for use by him on May 10th, 1913. They did not have those cars on the 12th. In the mean time, twenty-five of those cars had been delivered to J. E. Roberts & Company, after K. D. Oliver cancelled the order.

Mr. BARRY.—That is all.

Mr. STONEMAN.—No questions.

A JUROR.—I would like to ask the witness if his duties as stenographer also comprised for him to know as part of that duty the number of cars in the yards at Nogales.

A. Yes, sir.

Mr. STONEMAN.—Q. It does, eh?

A. Yes, sir.

Mr. STONEMAN.—In view of the question I would like to ask another question.

The COURT.—Come back Mr. Joffroy.

Cross-examination.

(By Mr. STONEMAN.)

Q. You say, as a matter of fact, that there were not other cars in Nogales which were available to be used by Mr. Oliver some time in the future, three or four days?

A. They had only thirty-two forty-foot stock cars.

(Testimony of A. M. Joffroy.)

Santa Fe stock cars. [247]

Q. What day?

A. On the 9th. I don't remember whether they had any more cars there on the 10th.

Q. Did you have any more cars there on the 11th that might have been used by Oliver?

A. We did not have any. We gave twenty-five cars to Mr.—

Q. Let me ask—Do you know whether or not you had any cars there that might have been used by Oliver or Hall on the 10th? Can you say whether or not there were cars there or whether there were not? Isn't it possible, Mr. Joffroy—

A. Yes, we did.

Q. You had? A. We had, yes.

Q. Now, then, isn't it possible, notwithstanding the fact that this particular order of thirty-two cars may have been cancelled, as it was, that Mr. Oliver and Mr. Hall by arrangement with your superiors in office in the Southern Pacific Company might not have arranged for fifteen to twenty cars on the 10th?

A. They did not.

Q. On the 11th?

A. I mean on the 11th they did not.

Q. On the 12th? A. No, sir.

Q. They couldn't have done that?

A. No, we would have a memo, on file showing that.

Q. You speak for the superintendent?

A. For the agent.

Q. For the agent at that place? A. Yes, sir.



(Testimony of A. M. Joffroy.)

Q. And you testify to that? Do you mean that they did not order cars?

A. They did order the cars, but we cancelled the order on the 9th.

Q. No, but in your testimony do you mean to say that they did not order any more cars between the 9th and 12th; or do you mean—

A. They did not order any more cars.

Q. Now, could they not have ordered some and received them? A. I should say yes.

Mr. STONEMAN.—That is all.

Redirect Examination. [248]

(By Mr. SEABURY.)

It is a fact that when any orders for cars are given to our superior or our office, that there is always a memorandum in writing made and filed with that particular office. All the time.

I know how many empty cars that nobody had ordered were in the yards of the Southern Pacific Company ready for immediate use on the 10th, 11th, 12th or 13th of May, 1913. Santa Fe stock cars, there were only thirty-two.

Q. And is it not a fact that you used twenty-five of those for someone on receiving Mr. Oliver's telegram?

A. Yes, sir; twenty-five of them Mr. J. E. Roberts—the balance of the thirty-two remained in the yards. Those were all that kind of cars that we had.

Mr. SEABURY.—That is all.

(Testimony of A. M. Joffroy.)

Recross-examination.

(By Mr. STONEMAN.)

We don't keep cars there ready for any shipper who wants them. The order is sent to Tucson.

Q. Where there may be a surplus of vacant cars?

A. Tucson.

Q. Couldn't an order have been sent in to Tucson and the cars been down there in less than a day—you don't know that that isn't true, do you?

A. Well, it takes them sometimes two days to bring the cars. Sometimes three days. It all depends on whether they have the cars on hand.

Q. Oh, yes. But suppose they had the cars on hand in Tucson, couldn't they have wired to Tucson for those cars and had the cars down in Nogales in a day?

Mr. SEABURY.—We object to that, if your Honor please, because it assumes a state of facts that hasn't been proved; namely, it has been proved that there were no such cars on hand at Tucson.

Mr. STONEMAN.—I did not assume there were; I said suppose there [249] were.

Mr. SEABURY.—Well, we think you might just as well say assuming that they were; just a difference in terminology; that is all.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Q. Isn't that true?

A. Yes, sir. So the mere fact that we had given the use of these cars to someone else on the 9th would not have prevented Mr. Hall or Mr. Oliver from

(Testimony of A. M. Joffroy.)

wiring to Tucson and having the cars down there for the 12th, if they had use for them. They could have secured them on the 12th, notwithstanding they canceled the order for the cars that they ordered on the 9th.

Q. You would not expect people to order cars unless they had use for them, would you? Now, Mr. Witness, isn't it customary when cars are ordered and the one who orders them finds that he has no immediate use for them, to cancel that order to save demurrage of a dollar a car?

Mr. SEABURY.—We object to that on the ground that the proof of custom is not admissible—not proper cross-examination.

The COURT.—Objection sustained.

Mr. STONEMAN.—Q. Have you ever known people, anyone else, besides Mr. Oliver, to cancel an order for cars because he had no use for them on the day that they were ordered?

The COURT.—I will change my ruling on that because of the fact that the witness stated that it was his duty to know of the cars that were in the yard.

Mr. SEABURY.—But I direct your Honor's attention to the fact that our objection goes to the point that assuming that he has knowledge of the custom, proof of the custom is immaterial and incompetent in this case, because the issue in this case is what Mr. Hall did with reference to this particular shipment, and we claim that proof of custom is incompetent to prove that or disprove [250] that issue.



(Testimony of A. M. Joffroy.)

The COURT.—I will permit him to answer the question.

Mr. SEABURY.—We except.

Mr. STONEMAN.—Q. Isn't it the custom for those who order cars to be used on a certain date to cancel that order and reorder in the event they find that they have no use for the cars as of the date that they are ordered?

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. Yes, sir.

Mr. STONEMAN.—That is all.

**[Testimony of E. W. Myers, for Defendant.]**

E. W. MYERS, being called as a witness on behalf of the defendant herein, having been previously sworn, was examined and testified as follows:

**Direct Examination.**

(By Mr. SEABURY.)

My name is E. W. Myers. I am in the cattle business at El Paso, Texas. I have been in the cattle business all my life. I have traded about fifteen or seventeen years, in Texas, New Mexico and Arizona and Mexico, Chihuahua, Sonora. I have been familiar with the Terrazas cattle seven or eight years. I know Terrazas cattle when I see them. I know Mr. Kibbey, Mr. Elias, Mr. Hall and Mr. Oliver. I made the original contract that is being sued on in this case on the 16th day of January last year with the Alamo Cattle Company. Cattle were shown to me at that time at Mr. Elias' and Mr. Kib-

(Testimony of E. W. Myers.)

bey's ranch, known as the Alamo ranch and the La Moraga, I believe, is the name of it; two ranches west and northeast of Magdalena. I saw them with Mr. Oliver. Along about the latter part of January or the first of February; I couldn't give the exact date. I showed Mr. Oliver then as near as I could the same cattle that I saw when I bought [251] the cattle. And shortly thereafter I made Defendant's Exhibit "B," which is the contract between myself and Mr. Hall. I signed it with Mr. Oliver, on the 4th day of February, I think it was, 12th or 13th. After that I again saw the cattle on the 10th day of May, I think it was. I did not see them between February and May. On the 10th of May I went out from Nogales to look at the herd of cattle, that bunch of cattle that was in the herd up at the Distilladero Ranch, they call it. That is the ranch that is nine miles south of Nogales. Mr. Gillespie and Mr. Elias went with me. Neither Mr. Hall nor Mr. Oliver were there at that time. I saw a herd of steers, two year olds—well, supposed to be two year olds, most of them two year olds. Those cattle were similar to the cattle which I had previously shown to Mr. Oliver. I next saw those cattle on the 13th, I think it was, at the same ranch that I saw them on the 10th. On the 13th Oliver and Mr. Hall and Mr. Gillespie, Mr. Elias and myself and the cowboys were present. I am practically sure about the date being the 13th. Wait a minute. Wait about that 13th just a minute. I believe the next time I saw those cattle was on the 12th instead of the 13th. We left

(Testimony of E. W. Myers.)

shortly after the arrival of the Nogales train from Tucson. We arrived where the herd was and went out and began to look through them, and Mr. Hall said, I think the first thing he said was, that he did not think there was twenty carloads there. He did not think he could get twenty carloads out of there, and I think the next thing he said was that he did not consider them equal to the Terrazas cattle. I told him that I thought that the contract did not call for twenty cars, but called for a train-load. Well, he said, "I don't think there is a train-load of cattle there." "Well," I says, "Mr. Hall, cut them and show me whether or not there is a train-load of cattle here or not." And we began discussing points, and he said that he did not think that [252] there were that many two-year old steers in the herd. I asked him then how he could ascertain whether or not there was fifteen cars or more or less until he had cut the cattle down according to contract. And he said that it was useless, that he did not think the number of cattle was there. Well, we were standing about—he was sitting on a horse—he had ridden through the herd—he was sitting on his horse as a steer passed by and he says, "What do you call this one?" I says, "A two year old." Another one passed and he says, "What do you call that one?" I says, "I think it is a two year old." And I think it was the third or fourth steer that passed he says, "What is that?" And I says, "I think it is a two year old." And he says, "I will bet you five dollars." "Well," I says, "I will bet you twenty-five."



(Testimony of E. W. Myers.)

He says, "No, I will bet you five." Well, I reached in my pocket and got five dollars and handed it to Mr. Hall, sitting on his horse, and a Mexican and I caught the steer, throwed it down and he showed two full-grown second growth teeth. Then I says to Mr. Hall, I says, "That is evidence, Mr. Hall, that you cannot look at a bunch of cattle and ascertain whether or not they are so many of a certain number, or more or less, in the herd of cattle." I says, "Cut them and show me where I am wrong." He says he thought it was useless; he did not think they were there. We talked along on the matter; I don't know just the exact conversation that took place, but he finally did cut seventeen cattle and said, "That is the kind of cattle we want." I told him that I didn't blame him; that he was trading in Mexico instead of the United States; and that those cattle were equal to the native cattle in our country. And he said, "Yes, those are good cattle in any country." The seventeen head—he had reference to the seventeen head that he cut out. I could not say positively why he cut them, but he said those are the kind of cattle we want. He didn't cut in my presence any yearlings [253] out of the herd. He didn't cut any other defectives. I don't know that he pointed out any other unmerchantable cattle in that herd, but he said there were some cattle in there not under the contract. My response was that a man was cutting on the other side and throwing out that kind of stuff. I requested him to make the cut. It was quite a herd. I don't know how many. I judged—it was pretty

(Testimony of E. W. Myers.)

closely thrown together, and there were a thousand to thirteen, maybe fourteen hundred, possibly a few more.

They were throwing out, working on unmerchantable cattle. There were some stags in there. I don't think there were a great many. I did not see any cripples or lump-jaws. I don't remember seeing any sway-backs or blinds. I don't remember seeing any cattle they could not ship. The unmerchantables are covered by the runts, blinds, cripples, and such stuff, and cattle too thin to ship. I could not say that I saw any number—possibly a few. Well, I considered the big majority of the number in the herd were two year olds. It is my opinion that there was a train-load lot of two year old steers as good as or better than Terrazas cattle in that herd at that time. I don't think I had any further talks there on the ground with Mr. Hall about these cattle. We talked the matter over in Nogales after we left the herd that evening and went to town. Mr. Hall insisted that the cattle were not according to contract; that they were not as good as Terrazas cattle, and not in shipping condition. I cannot recall the entire conversation, but there is another thing that did take place. I asked Mr. Hall if he would take his forfeit money back and return me the contract. He said he ought to have a thousand dollars for expenses and time he was out in the transaction. I told him I would not consider it. I was present at a discussion of this matter in Nogales after I came [254] back from the ranch on the 12th or 13th in

(Testimony of E. W. Myers.)

which Mr. Hall and Mr. Elias and Mr. Kibbey and myself took part. I did not make a *bona fide* offer, but I asked if he would take the ten thousand dollars back and let me have the contract. That took place in the park almost directly in front of the First National Bank, under one of the big trees, on a seat. He said he thought he ought to have a thousand dollars if he was out time and expense on this deal. I told him I would not consider it. That was the evening of the day we had looked at the herd of cattle at the Distilladero Ranch. I had further talks with Mr. Hall on this subject, on two occasions. I think the first time was in Deming. I could not give the exact date, but it was some time early in the spring—it must have been some time in April, 1913. We just passed between trains. I was catching the train for El Paso. He told me that Mr. Oliver had sold the cattle. These same cattle I had sold to Mr. Oliver.

The other conversation was afterwards. It must have been in June, the latter part of June or the first of July. I cannot recall the exact date. I asked Mr. Hall what he was going to do about this case. He said he did not know. And in discussing the case I asked him if he did not think he made a mistake in refusng to cut the cattle, and he said, "yes," that he thought he made a mistake in not cutting them. That is about the extent of the conversation, as I recall.

Mr. SEABURY.—That is all.



(Testimony of E. W. Myers.)

Cross-examination.

(By Mr. STONEMAN.)

Q. In that last conversation you testified to having had with Mr. Hall, in which you said that Mr. Hall said he thought he made a mistake in not cutting the cattle, did he not add to that, as a reason, that if he had cut those cattle, there would [255] have been no question about there not having been a train-load?

A. No, I don't think that was brought up. I do not recall any further conversation about it at that time. To the best of my recollection, there was nothing said about that reason. All he said in that conversation was that he made a mistake in not cutting the cattle. I would not say that was all—a natural line of conversation after that, but I don't think there was anything bearing on the transaction. I don't remember anything.

Q. Mr. Myers, in your testimony—I did not object because I did not suppose you meant it—you made use of the term: the cattle that I sold to Mr. Hall. You don't mean that you showed him five thousand head of cattle which you sold him—you mean you sold the rights under the contract?

A. I don't mean I showed him five thousand head of cattle. I mean that I sold to Mr. Hall the rights I had to the delivery of certain cattle under the contract I had with the Alamo Cattle Company. I showed Mr. Oliver in January or February as near as I could the same cattle I saw when I bought the cattle, in the same pasture.

I cannot swear that the cattle which the defendant

(Testimony of E. W. Myers.)

tendered to Hall on the 9th of May were the same bunch of cattle which I showed Hall in January or the early part of February, nor would Mr. Oliver have any right to expect them. No more than I would have the right to say they were the same. I showed as near as I could under their contract with me the cattle that were shown to me under the contract with the Alamo Company. If I had pursued my contract with the Alamo Cattle Company I would have expected cattle coming up to that grade. I would have expected them to be according to the contract. I say that there were one thousand to thirteen or fourteen hundred head that I saw. I first saw these on the 10th, and I again saw them on the 12th. I am pretty positive. I can look up the data, but I am positive it was the 12th. I don't think there were less than a thousand or [256] more than fourteen hundred.

Q. Don't you think it possible for a cattleman of your long experience to estimate a bunch of cattle more close than four hundred head?

A. I could, perhaps, but when a bunch of cattlemen get together, they could be long or short, but I don't think there is any chance—I think the happy medium is between the two. I don't think I would be four hundred off, the total number of which was fourteen hundred.

I think there were a few stags in there. I don't know how many. I don't think there were many in there too thin to ship. There may have been a few. I am not prepared to say that they were all full two

(Testimony of E. W. Myers.)

year olds. I did not see any three's or four's in that herd. I don't think there were cattle over three years old in that particular herd. I think there were some in there that were not full two year old steers at that date. I could not say what proportion were not full two's without cutting them down to ascertain—it is impossible. Sometimes you are mistaken. Sometimes you think you are right, and you are wrong; sometimes you think you are wrong, and you are right.

Q. Then, this five-dollar bet—that was a pretty onery looking steer?

A. He was small, but in good condition. I don't think Mr. Hall at that time pointed out five or six more which he offered to bet were not full two year olds. I never won a dollar when I did not give him a chance to break even.

Q. Did he not ask you to say whether or not this steer was more than two years old?

A. He may have asked the question, but I think that ended it.

Q. You never took him up?

A. I don't think he challenged or said: "I will bet five dollars that is a two year old," or I would have given him a chance to break even.

Q. If Hall had pointed out a steer and said: "I will bet you five [257] dollars that is not a two year old," and you agreed, you would not have bet?

A. That depends.

Q. If you agreed that it was not a full two year old, you would not have bet again with him?



(Testimony of E. W. Myers.)

A. What is that?

Q. If you agreed that the steer was not a full two-year old, you would not have bet?

A. Certainly, if he picked out one—there is no question.

He possibly did pick out a steer and say, "There is a steer that is not a full two year old." I don't think he did two or three. I could not say how many. What I thought you were trying to get out was that he offered to bet five dollars that that steer was not a full two year old.

Mr. Hall cut out seventeen head. Out of that seventeen head he called my attention to some of them. He said there is a possibility of even some of those cut out not being full aged steers. I did not question him. I said it is possible, that you don't have to take them. He did not offer to show them to me—did not offer to tooth them. We only toothed one animal that I saw.

He was riding around among the herd, and he could have toothed some cattle I did not see. That was the only one I saw. I don't think any of the seventeen head were toothed. I did not tooth any more at all.

Q. No two's to which your attention was directed by Hall that those were not full two year olds?

A. What is that?

Q. That is immaterial, anyhow. You don't claim simply because you won a five dollar bet with Mr. Hall as a mistake of judgment that as to the fourteen hundred head Mr. Hall was incompetent to judge the age of the cattle?

(Testimony of E. W. Myers.)

A. I do say this: that a man cannot ride up and say that among a herd of a thousand or fourteen hundred two year olds, there were twenty carloads and ten carloads or what. [258]

I do not mean to say that because Mr. Hall was mistaken in calling my attention to one steer out of fourteen hundred as to the age of it, that he is incompetent to judge as to what is or what is not a full two year old steer; but I do contend that he cannot tell whether there is fifteen carloads in there or ten carloads until he has cut those down and shown those that differ in appearances.

If a seller was under contract to furnish a train-load of full two-year olds, I would apply the same rule to the seller as to the buyer, if he was selling full two-year olds at the time of the delivery. I am absolutely not interested in any way in the outcome of this suit. I was naturally interested at the time of these different conversations in sustaining the contention of the Alamo Cattle Company that these cattle claimed to have been tendered were contract cattle. In the first place, in the contract there was three dollars a head profit to me on the two year olds and four dollars a head on the four year olds if the cattle were delivered.

Q. And you would not be able to realize on your contract if the cattle were not delivered under this wording of the contract; that the said E. W. Myers is to receive the aforesaid consideration of three dollars a head for the two year old steers and four dollars a head for the four year old steers only in case

(Testimony of E. W. Myers.)

they are delivered.

Mr. SEABURY.—Now, we object to that, if your Honor please, upon the ground that such testimony requires Mr. Myers to construe as a question of law the effect of the contract between him and Mr. Hall, and upon the ground that it is incompetent and not within the issue of this controversy and not tending to establish any interest of Mr. Myers in this case.

The COURT.—Objection overruled.

A. Yes, sir.

(By Mr. STONEMAN.) [259]

The only condition upon which I could hold Hall to the contract was if they were delivered.

Mr. STONEMAN.—That is all.

Redirect Examination.

(By Mr. SEABURY.)

From the first of January up to probably the first of April the market value of Sonora cattle as good as or better than Terrázas cattle in Nogales advanced, and after that they depreciated like in most every spring. I would say that it was lower in May, 1913, than it was a short time prior.

Mr. SEABURY.—That is all.

The COURT.—You are excused.

Mr. SEABURY.—The defendant rests, if your Honor please.



REBUTTAL.

[**Testimony of John G. Hall, in His Own Behalf  
(Recalled in Rebuttal).**]

JOHN G. HALL, called as a witness in his own behalf, in rebuttal, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

I heard the testimony of Mr. Myers with reference to a conversation in which Mr. Myers stated that I said that I had made a mistake in not cutting the cattle at the time they were offered at the Distilladero Ranch in Mexico. The conversation was this: We were discussing the circumstances as they happened, and I told him that I thought it would have been better if we had gone ahead and cut out of the cattle that there was in the herd all that did comply with the contract because we would have convinced the Alamo Cattle Company beyond a doubt that they did not have a train-load. He said he could not tell about that. He did not know whether they did or did not have a train-load. [260]

Mr. STONEMAN.—That is all.

Mr. SEABURY.—That is all.

Mr. STONEMAN.—The plaintiff rests.

And the foregoing was all the evidence given, introduced, heard and exhibited at the trial of said cause.

Be it remembered that during the trial of this cause further proceedings were had as follows:

Mr. SEABURY.—If your Honor please, on behalf of the defendant, I desire to renew the motion made at the close of the plaintiff's case for a directed verdict in favor of the defendant and against the plaintiff, and that plaintiff take nothing from the defendant in this case, upon the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action against the defendant in this case; particularly, in that it appears from the evidence of the plaintiff that after the alleged breach of the contract sued upon and on or about May 12th or 13th, 1913, another and different contract than that which was the subject of this suit was made and entered into between him and the defendant, Alamo Cattle Company, and also upon the ground that such proof constitutes a variance between the pleadings and the proof in this case, which is fatal to the plaintiff's case herein, and upon the other grounds urged at the close of the plaintiff's case.

The COURT.—As I construe the evidence of the witnesses, the conversation which took place between Mr. Hall and Mr. Kibbey was in the nature of negotiations looking to a settlement of this litigation, and was not a contract which took the place of the original written contract, and I think I am supported in that by the letter of May 13th written by the defendants to plaintiff, in which they attempted to or did cancel the written contract, [261] and by the telegram sent by the Alamo Cattle Company to K. D. Oliver and signed by W. B. Kibbey, dated May 13th, in which it is stated that "Myers refuses to com-

promise; advise if you want to go ahead with our further agreement." So the motion is overruled.

Mr. SEABURY.—We except.

Mr. STONEMAN.—I direct your Honor's further attention in support of your Honor's ruling to the testimony of the witness Elias, who, in answer to the questions propounded to him by counsel for defendant, stated that his understanding the conversation was that it was an endeavor on the part of the parties present at the conversation to find some way to settle this lawsuit.

The COURT.—All right.

**[Instructions Requested by Defendant.]**

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

"By its terms it was the duty of the defendant upon receipt of fifteen (15) days' notice to deliver upon cars furnished by the plaintiff at Nogales, Arizona, during the months of April and May, 1913, in train-load lots from four thousand (4,000) to five thousand (5,000) head of two year old and one thousand (1,000) head of four year old steers of a quality as good as or better than Terrazas cattle."

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury



retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“But I charge that it was incumbent upon and was the duty of the plaintiff under the contract to give the defendant [262] fifteen (15) days’ notice of each delivery; to furnish the cars at Nogales, Arizona, to receive the cattle; and to guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales before each shipment crossed the line, and to make such payment when the cattle were delivered on board of the cars.”

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time, and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“I charge you that the duty of the defendant to deliver the specified cattle depended upon prior notice by the plaintiff to the defendant to deliver the cattle to him and upon the willingness and ability of the plaintiff to receive the cattle and to pay for them when they were placed on board of the cars furnished by the plaintiff.”

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this

cause and at the proper time, and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“If you find that the defendant is entitled to a verdict and that it sustained actual damage in excess of ten thousand (\$10,000) dollars already received, you will then ascertain and determine what, if any, sum in addition thereto and not exceeding the sum of seven thousand three hundred (\$7,300) dollars in addition the defendant is entitled to recover from the plaintiff by way of counterclaim.” [263]

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“In this connection if you find that the plaintiff breached the contract while the defendant was free from fault and ready and willing to perform its part of the contract, you will award to the defendant such sum not exceeding seven thousand three hundred (\$7,300) dollars in addition to the ten thousand (\$10,000) dollars, as in your judgment will reasonably compensate the defendant for the actual loss and damage if any were sustained by it over and above the said ten thousand (\$10,000) dollars by reason of the plaintiff's breach of the contract.”

Which instruction the Court refused to give, to

which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“If you find from the evidence that defendant tendered and offered to the plaintiff a herd of cattle in May, 1913, from which the plaintiff could have cut a train-load of two year old steers, as good or better than Terrazas cattle, and that plaintiff refused to receive them, then you must find a verdict for defendant.”

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider [264] their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“I further charge you that the provision in the contract which required the buyer to give 15 days’ notice before the delivery of each shipment was a provision for the benefit of the seller.”

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider their verdict, the defendant requested in



writing the Court to give the jury the following instruction:

“I further charge you that, under the contract, the seller had the right and privilege to tender and offer to the buyer, during April or May, 1913, the cattle called for in the contract, in train-load lots, without prior notice and demand from the buyer, and if you find that the defendant did during May, 1913, duly tender such cattle to the plaintiff, and that he refused or failed to accept them, then I charge you that the plaintiff breached the contract, and your verdict must be for the defendant, unless you find that the defendant waived the particular breach in question.”

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“I further charge you that it was not contemplated by the terms of the contract sued upon that the plaintiff could require all of the cattle called for under the contract to be delivered in one shipment or at one time. [265] A reasonable construction of the contract entitled the defendant to make deliveries during April and May, in train-load lots, and defendant was not required to deliver all the cattle under the contract in one shipment or at one time, pursuant to the notice contained in plaintiff's telegram of May 14th.”

Which instruction the Court refused to give, to

which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause and at the proper time and before the jury retired to consider their verdict, the defendant requested in writing the Court to give the jury the following instruction:

“I further charge you that, even if you find that the cattle tendered to plaintiff on May 9th or May 12th, or both, were not up to the contract, yet if you believe and find that, prior to those dates or either of them, the plaintiff was not ready, willing and able to perform his part of the contract, then you must find for the defendant.”

Which instruction the Court refused to give, to which ruling of the Court the defendant thereupon excepted.

Be it remembered that during the trial of this cause further proceedings were had; the Court charged the jury as follows:

**[Instructions of Court to Jury.]**

“GENTLEMEN OF THE JURY:

“It now devolves on the Court to state to you the law regarding this case. If I state the testimony, I shall do it for the purpose of calling your attention to it, and stating its tendency. If I intimate an opinion on a disputed question of fact you are not to be governed by it, unless it corresponds with your own ideas as to what the facts are. I do not intend to state the testimony, but should I state any part of it and make a mistake in so [266] doing or in alluding to any fact in the case, you will correct it by your

own recollection and judgment. I shall endeavor to state to you the law which covers this case and it is your duty to take the law from the Court.

“While it is the province of the Court to deal with the law of the case, it is exclusively your province to pass upon the facts. It is your duty to consider the evidence in the case as a whole and not give undue importance to minor points or to portions of the evidence taken piecemeal. Any case involving much testimony and many facts should not be decided upon the probability or improbability of any one point singled out of the evidence, but a proper decision requires due consideration to be given to all the evidence, direct and circumstantial, oral and documentary, in the case. You will examine the testimony calmly, carefully and impartially, and announce the result of your verdict.

“This is an action at law, brought by James G. Hall, a citizen of the State of Colorado, as plaintiff, against the Alamo Cattle Company, S. A., of the State of Sonora, Republic of Mexico, for the recovery of \$20,000, together with interest thereon from May 13th, 1913, claimed by plaintiff to be due him by defendant, by reason of the alleged nonperformance by defendant of a contract for the purchase and sale of cattle.

“The complaint alleges, in substance, as follows: The plaintiff at all times mentioned in the complaint was and is a citizen of the State of Colorado; that defendant corporation was and is a corporation organized and existing under the laws of the Republic of Mexico, and engaged in the business of raising and



buying cattle at Nogales, Naco and Douglas, Arizona, this corporation having been represented on and before January 16th, 1913, in the State of Arizona, [267] by its President, W. Beckford Kibbey, Jr., and by its Secretary, one Ramon Elias.

“That E. W. Myers on the 16th of January, 1913, and the 4th day of February, 1913, was a citizen of the State of Texas; that on said last-mentioned dates said Myers might have prosecuted in his own name in this court this cause of action upon a certain contract hereinafter mentioned.

“That on January 16, 1913, said cattle company, the defendant therein, at Nogales, Arizona, entered into a contract with said E. W. Myers of El Paso, Texas, by the terms of which it agreed to deliver to him not less than four thousand nor more than five thousand head of two year old steers, and one thousand head of four year old steers, same to be delivered f. o. b. cars at Nogales, Arizona, all duties and expenses thereon to be paid by defendant; the cattle to be delivered in train-load lots during the months of April and May, 1913, and all to be branded as set out in the contract. That said Myers should furnish cars; that all of said cattle should be of a grade as good or better than the cattle known as ‘Terrazas cattle,’ and that Myers should be permitted to cut out and reject 15% of all of said cattle, after certain specified unmerchantable cattle had been cut out by defendant. That upon delivery of said cattle as above set out, said Myers should pay (subject to certain conditions and reservations) to said defendant, through its said President and Secretary,

\$23.00 per head, United States Currency, for all two year old steers, and \$28.00 per head, United States Currency, for all four year old steers; of this defendant acknowledged receipt of \$10,000 as a partial payment on same, and said Myers agreed to pay the balance of said purchase money, when said [268] cattle above described should be delivered on board cars at Nogales, and failing to pay said balance, said Myers, should forfeit said \$10,000 and any further amount advanced under the contract. That should defendant fail to deliver such cattle, of the grade, brand and description, and in the numbers and at the times mentioned in the contract, then defendant should pay to said Myers \$2.00 per head for all cattle which it so failed to deliver, and should return said \$10,000 and any further amounts advanced under the contract, as a forfeit and in liquidated damages to said Myers. That said contract was executed January 16th, 1913, and on that date said Myers paid to W. Beckford Kibbey, Jr., President of said defendant corporation, the sum of \$10,000 acknowledged in said contract.

“Plaintiff further alleges that on February 4th, 1913, for a good and valuable consideration, said Myers did assign said contract to him, James G. Hall, the said contract and all the rights and interests therein held by the said Myers, including any and all claims for damages and rights of action against defendant, and that plaintiff, on said 4th day of February, 1913, and ever since, has been and is the owner and holder of all rights, claims and causes of action which have accrued or might have accrued to said



Myers as against defendant, under the terms of said contract.

“Plaintiff further alleges that during all times during the months of April and May, 1913, plaintiff was ready and willing to comply and did comply with the terms of said contract, and that during the month of April, and up to the 13th of May, at which time defendant notified him that it would not perform the terms of said contract, he was at the town of Nogales, Arizona, ready to receive said cattle. That the cattle tendered to him up to May 13th, 1913, were not cattle tendered in train-load lots as good or better than the ‘Terrazas cattle,’ or of the kind, grade, character, brand or numbers required under the terms of the [269] contract.

“Plaintiff alleges that upon the failure of defendant to comply with the terms of said contract, and prior to the commencement of this action, he demanded from the defendant the return to him of the sum of \$10,000 paid by said Myers to defendant through its President, Kibbey, and also demanded the sum of \$2.00 per head on 4,000 head of two year old steers and 1,000 head of four year old steers, making an aggregate sum demanded by plaintiff from defendant of \$20,000, which plaintiff claims is due from defendant to plaintiff under the terms of said contract, but that defendant refused and still refuses to pay to plaintiff said \$20,000, whereby plaintiff is damaged in the sum of \$20,000.

“To this defendant has filed its amended answer and counterclaim, alleging in substance as follows:

“That its knowledge as to the citizenship of either



Hall or Myers is insufficient to form a belief; denies the remaining allegations of the complaint, except to its own citizenship, admits that it executed the contract with said Myers, above referred to, and that it refuses to pay to the plaintiff the sum of \$20,000.

“For a separate defense, defendant alleges, that it is a corporation organized and existing under the laws of the Republic of Mexico, that it has been and now is duly authorized to transact business in the State of Arizona, and has a place for the regular transaction of its business at Nogales, and that it has in all respects complied with the laws of Arizona relating to foreign corporations.

“That on or about January 16th, 1913, defendant made a contract with E. W. Myers, being the same contract hereinbefore referred to in plaintiff's complaint; on information and belief, defendant alleges that on or about February 4th, 1913, said contract [270] was by said Myers assigned to J. G. Hall, the plaintiff herein, and that thereafter and thereupon, said Hall agreed to perform all of the terms and conditions of said contract required to be performed by said Myers.

“That at all times during the months of April and May, 1913, defendant was ready, willing and able to comply with the terms and conditions of said contract by it to be performed, and did duly and fully comply with same, until the plaintiff refused to perform the terms and conditions on his part to be performed; that early in April, 1913, defendant tendered to plaintiff 1,000 head of cattle of kind and quality agreed in said contract, which plaintiff refused to ac-

cept; that on or about May 9th, 1913, defendant tendered to plaintiff between 1,200 and 1,500 head of cattle of the agreed kind and quality, and on May 13th, 1913, 1,093 cattle of the same kind and quality, but that plaintiff refused to receive said cattle, and failed to furnish cars for loading same, and made no arrangement satisfactory to the First National Bank of Nogales, Arizona, for payment of the purchase price of said cattle, although payment thereof has been duly demanded and has wholly failed to perform the terms and conditions of said contract to be by him performed.

“Defendant also alleges that the value of the cattle described in said contract is of a fluctuating character, and the amount of damages which defendant could sustain by reason of plaintiff’s breach of contract, uncertain and not readily ascertainable, and said sum of \$10 a reasonable and usual sum to be paid to defendant as liquidated damages and not as a penalty or forfeiture for breach of said contract.

“For a counterclaim, defendant alleges that, in order to perform said contract, defendant purchased and gathered 5,000 head of cattle of the required kind and quality, and was obliged [271] to hold them for delivery to plaintiff during April and May, 1913, at great expense, by reason of plaintiff’s failure to receive them, that the cost of same was \$1.00 per head, making an aggregate of \$5,000.00; that defendant lost by death at least 200 head of said cattle, entailing a further loss of \$3,600; that defendant was obliged to hold 2,000 head of said cattle, being unable to sell them, until the month of November, 1913, en-



tailing an additional loss of \$6,000; and that at least 150 head of said 2,000 cattle died, costing defendant \$2,700 more, making a total loss of \$17,300.00, of which defendant has received no part except the \$10,000 received upon the date of making said contract with said Myers.

“The Court has ruled in this case that defendant is not entitled to recover of the plaintiff the \$7,300, or any part thereof, set up or claimed in its counter-claim or cross-complaint. Therefore, it will be unnecessary for you to consider any evidence with regard to such claim.

“As I will presently charge you, if you find for the defendant, your verdict will mean that the defendant is entitled to retain the \$10,000 already paid to it, but no other sum or sums whatever.

“You are instructed that all the rights that Ed. W. Myers had under that contract sued upon, have been transferred to the plaintiff and all of the duties assumed by Ed. Myers have been assumed by the plaintiff and that the defendant has accepted the assignment of the contract to the plaintiff.

“You are instructed that the burden of proof is upon the Alamo Cattle Company, before they can recover judgment against plaintiff to show that cattle alleged to have been tendered on May 9th, and 12th, 1913, fully complied with the contract in every respect.

“You are instructed that if you believe the cattle tendered [272] on or about May 9th or May 12th did not comply with the contract as far as quality, ages and numbers are concerned, the letter from the



defendant, dated May 13th, 1913, constituted a breach of the contract on the part of the defendant and justified the plaintiff in treating it as violated by the defendant and at an end.

“You are instructed that under the contract sued upon, there can be no tender of cattle by the defendant to the plaintiff, unless the cattle are of the contract, quality and ages and in train-load lots.

“You are instructed that under the terms of the contract sued upon, the obligation was imposed upon the defendant to gather and deliver a train-load of cattle complying in all respect as to grade and quality with the requirements of the contract and plaintiff was under no obligation to examine, inspect or cut from the herd of cattle gathered for delivery by defendant, cattle not up to such requirements. In other words, the plaintiff is not, under the terms of the contract sued upon, required to cut from any herd of cattle gathered, such cattle as there might be in the herd, consisting of runts, stags, cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship; unmerchantable cattle, cattle under two years old, all cattle not of the grade as good or better than Terrazas cattle.

“You are instructed that if you find from the evidence and believe that plaintiff was ready and willing and able to receive and pay for all cattle, in the numbers, of the ages, brands and quality required under the terms of the contract sued upon, and if you further find from the evidence and believe that the defendant failed in any respect to comply with the terms of said contract (provided you further

find that such non-compliance on the part of the defendant [273] was not occasioned by the act of the plaintiff), you should find a verdict for the plaintiff in the full sum of \$20,000 as prayed for in plaintiff's complaint.

“You are instructed that under the terms of the contract sued upon, the plaintiff was under no obligation to arrange for payment of the cattle to be delivered until and unless the defendant had gathered and offered for delivery in the Republic of Mexico, cattle of the grade and quality required under the terms of the contract and in numbers sufficient to constitute train-load lots, after deducting 15% of contract cattle.

“You are instructed that under the terms of the contract, it became the duty of the defendant to gather and tender to the plaintiff, merchantable cattle of full ages as required under the terms of the contract, that is to say, all two year old cattle, must have been full two years old at the time of the gathering and offer to the plaintiff, or must have been full four years old and the plaintiff is not required under the contract to accept any cattle, less than full two years old.

“You are instructed that no duty devolved upon the plaintiff in the matter of delivery and acceptance of cattle from the defendant under the terms of the contract sued upon, other than to accept such contract cattle in train-load lots, provide cars for transportation and pay to the defendant the contract price per head upon delivery of the cattle, free of all the duties and expenses on board cars at No-

gales, Arizona. Unless, therefore, you find from the evidence and believe that the defendant actually gathered contract cattle in train-load lots, ready for delivery on board cars at Nogales, Arizona, plaintiff was under no obligation to arrange for payment therefor in a manner satisfactory to the First National Bank of Nogales, [274] Arizona.

“You are instructed that no duty devolved upon the plaintiff to cut from any cattle gathered by the defendant, runts, stags, cripples, lump-jaws, sway-backs, cattle too thin to ship or unmerchantable cattle, but that under the terms of the contract, the duty devolved upon the defendant of gathering and tendering for delivery to the plaintiff, cattle in train-load lots, of full ages, exclusive of cattle of the descriptions above mentioned and in numbers so as to permit of a cut by plaintiff of 15% of clean, contract merchantable cattle and still leave a train-load lot to be delivered on board cars at Nogales, Arizona.

“You are instructed that the contract sued upon is an assignable chose in action, by which term is meant, so far as this case is concerned, that the obligation was laid upon the defendant of fulfilling with plaintiff, all of the conditions of the contract provided to be complied with by defendant under its contract with Ed. W. Myers and that the plaintiff on his part is charged with the duty of complying with all the conditions to be performed under the terms of the contract by Myers and that both the defendant and the plaintiff, are, by the assignment of the contract by Myers to the plaintiff, vested with whatever rights, claims for damages, suits at law or



in equity, which might have been claimed or prosecuted either by Myers or the Alamo Cattle Company under the terms of the contract, before the assignment by Myers to the plaintiff.

“You are instructed that under the terms of the contract sued upon, defendant has no right to require plaintiff to accept delivery of any cattle in less numbers than train-load lots. Unless, therefore, you find from the evidence and believe that on or before the 12th of May, 1913, defendant in the Republic of Mexico did gather and offer for acceptance [275] by plaintiff, cattle of the kind, character, quality and brands specified in the contract, and in numbers, which, after cutting out 15% would constitute a train-load, you cannot find that the defendant complied with the terms of the contract.

“The contract makes the payment of the balance of the purchase price payable when the cattle are delivered on the cars, and I therefore charge you that the ability and readiness of the plaintiff so to pay for the cattle is a condition precedent to the plaintiff’s right of recovery in this action, unless you find that defendant refused to comply with the contract on its part before any breach of the contract by the plaintiff, in which event, the plaintiff need not show his readiness and ability to perform the contract.

“Gentlemen, I repeat: The contract makes the payment of the balance of the purchase payable when the cattle are delivered on the cars, and I therefore charge you that the ability and readiness of the plaintiff so to pay for the cattle is a condition

precedent to the plaintiff's right of recovery in this action, unless you find that the defendant, the Alamo Cattle Company refused to comply with the contract on its part before any breach of the contract by the plaintiff, in which event the plaintiff need not show his readiness and ability to perform the contract.

“If you find that the defendant tendered and offered cattle to the plaintiff in performance of the contract, which were not as good as or better than Terrazas cattle, and that the defendant refused to furnish any other cattle under the contract which were as good as or better than Terrazas cattle, then the defendant broke the contract and the plaintiff is entitled to a verdict.

“If you find that the defendant tendered and offered to the plaintiff, the cattle called for in the contract, in the [276] quantity and of the ages specified in the contract, and that such cattle were as good as or better than Terrazas cattle, then the verdict must be for the defendant.

“If you believe that the cattle tendered to the plaintiff on May 9th and May 12th fulfilled all the requirements of the contract and that plaintiff failed or refused to accept them, then this constituted a breach of the contract on the plaintiff's part, which relieved the defendant from any further duty to be performed on its part and justified the defendant, the Alamo Cattle Company in writing the letter dated May 13th, declaring the plaintiff's rights in the contract forfeited.

“You will observe that the contract provides that the buyer was required to give 15 days' notice for

each delivery of cattle in train-lots during the months of April and May, 1913, furnish the cars at Nogales, Arizona, to receive the cattle and to guarantee payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, before each shipment crossed the line and to make such payment when the cattle were delivered on board cars, but under the facts and testimony in this case, it is shown that the cattle, variously estimated at from one thousand to fourteen hundred head and alleged to have been by the defendant tendered to the plaintiff on or about May 9th or May 12th, 1913, under the contract, were not accepted or received by the plaintiff and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material issues in this case. I say it seems to me that they are not. The main issue of fact to [277] be presented to you for your consideration being whether or not the cattle tendered on or about May 9th or May 12th, 1913, were in reality as good as or better than Terrazas cattle, in train-load lots and in the numbers, of the brands, ages, grades and quality required under the terms of the contract, whether or not the plaintiff was justified in his refusal to take the cattle. I say it seems to me that those issues



are the main issues to be submitted to you for your determination.

“I think, gentlemen, I will repeat that under the facts and testimony in this case it is shown that the cattle, variously estimated at from one thousand to fourteen hundred head and alleged to have been tendered by the defendant to the plaintiff on or about May 9th or May 12th, 1913, under the contract, were not accepted or received by the plaintiff and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material,—material issues in this case. The material issue of fact to be presented to you and submitted to you for your consideration, being whether or not the cattle tendered on or about May 9th or May 12th were in reality as good as or better than Terrazas cattle; whether they were tendered in train-load lots and in the numbers, of the brands, ages, grades and quality required under the terms of the contract, whether or not the plaintiff was justified in his refusal to take the cattle.

“If you find from the evidence in this case that defendant tendered and offered cattle to plaintiff in performance of the [278] contract, which were not as good as or better than Terrazas cattle and that the defendant refused to furnish any other cattle under the contract which were as good as or bet-

ter than Terrazas cattle at the time and in the manner provided for in the contract, then the defendant broke the contract and the plaintiff is entitled to a verdict, regardless of whether the plaintiff was able to and did furnish cars at Nogales to receive cattle and regardless of the fact, if it be a fact, that payment for any cattle referred to in the contract had not been guaranteed in a manner satisfactory to the First National Bank of Nogales, Arizona. On the other hand, if you find that the defendant tendered and offered to the plaintiff the cattle called for in the contract, in the quantity and of the ages specified and that such cattle were as good as or better than Terrazas cattle, then your verdict must be for the defendant.

“By the terms of the contract, the seller agreed to sell and deliver the cattle called for in the contract, f.o.b. cars at Nogales, Arizona, all duties and expenses paid, but if you find from the evidence in this case that on or about May 9th or May 12th, 1913, the defendant, the Alamo Cattle Company, tendered to the plaintiff herein a train-load of cattle, in the numbers and of the ages, brands and quality required under the terms of the contract, and further believe that the plaintiff declined to receive or accept said train-load of cattle, upon the ground they were not of the numbers, brands, ages, grade and quality required under the terms of the contract and not on the ground that the defendant did not deliver the same f.o.b. cars at Nogales station, all duties and expenses paid, then it is not incumbent upon defendant to show to prove that this particular tender or

offer of these particular cattle were delivered f.o.b. cars [279] at Nogales, Arizona, all duties and expenses paid.

“In other words, gentlemen, it appears, and the evidence tends to show, I might say the evidence does show, that there was a breach of this contract by either the plaintiff or the defendant on or about the 9th of May, or May 13th, 1913, and I have told you that it is for you and for you alone to determine who breached the contract and what the main issue or issues were in this case.

“Therefore, it seems to me, as I said before, but will now repeat and explain, that if there was a breach, if either party breached the contract on or about May 9th or May 13th, 1913, then it is not material to inquire whether or not the defendant the Alamo Cattle Company loaded the cattle on cars at Nogales, nor is it material to inquire whether or not the plaintiff had made financial arrangements satisfactory to the bank at Nogales or had made satisfactory arrangements to have on hand cars to receive these cattle. In other words, it seems to me that they had not reached those points,—they had gotten to the point where the contract was breached by one party or the other before the time arrived for the plaintiff to make these financial arrangements or these arrangements for cars or for the defendant to deliver the cattle on board the cars at Nogales Station, Arizona. In other words, it was the duty of the defendant upon receipt of fifteen days’ notice of each delivery in train-load lots during the month of April and up to and including May 12th, 1913, to



gather and deliver f.o.b. cars at Nogales Station, all duties and expenses paid, the cattle called for under the terms of the contract and if the defendant did, on or about May 9th or 12th, 1913, tender and offer to plaintiff a train-load lot of the said cattle, in the numbers and of the ages, brands, grades and quality required under the terms of the contract and if [280] the plaintiff declined or refused to receive same, then it is not necessary in this case that the defendant should go further and show that the cattle were delivered f.o.b. cars at Nogales Station, all duties and expenses paid.

“On the other hand, if you believe from the testimony that the cattle so tendered by the defendant to the plaintiff at the time above mentioned, were not in the numbers, of the ages, brands, grades and quality required by the terms of the contract, then the plaintiff was under no obligation as to that particular lot of cattle, to receive same or furnish cars therefor, or to guarantee payment therefor in a manner satisfactory to the First National Bank of Nogales.

“If you believe from the evidence in this case that the defendant, the Alamo Cattle Company, on or about May 9th or May 12th, 1913, tendered to the plaintiff Hall, a train-load lot of cattle, and further believe that same were not in the numbers and of the ages, brands, grades and quality required under the terms of the contract sued upon, that they were not as good or better than Terrazas cattle and that for that reason the plaintiff declined to receive or accept same and did not accept the same, then the

defendant, the Alamo Cattle Company, was not authorized to breach the contract and its letter to the plaintiff Hall, dated May 13th, declaring the contract forfeited, was unauthorized and wrongful and constituted a breach of the contract on the part of the Alamo Cattle Co. That is, provided, I said, that you find from the testimony that the cattle tendered were not in the numbers and of the ages, brands, grades and quality required by the terms of the contract.

“On the other hand, if you believe from the testimony that the defendant, the Alamo Cattle Company, on or about said time above mentioned tendered to the defendant Hall, a train-load [281] of cattle and further believe that same were in the numbers and of the ages, brands, grades and quality required by the contract and that the cattle were tendered in full compliance with the terms of the contract and that plaintiff Hall declined to receive them or accept them and did not accept them, then the defendant, the Alamo Cattle Company, was justified in writing the letter dated May 13th, 1913, declaring the contract forfeited and at an end.

“The jury are instructed that the burden is upon the plaintiff, and it is for him to prove every material allegation of his complaint by a preponderance of the evidence. If upon any one or more of the material allegations of the plaintiff’s complaint, the evidence is evenly balanced, or if it preponderates in favor of the defendant, then the plaintiff cannot recover and the jury should find for the defendant. By preponderance of the evidence is meant the weight of evidence; that which on the whole, when fully, fairly

and impartially considered by the jury produces the stronger impression upon the mind of the jury and is more convincing as to its truth, when weighed against the evidence in opposition thereto.

“A fair preponderance of the evidence does not necessarily mean that a greater number of witnesses shall be produced on one side or on the other, but that, on the whole, the jury believe the greater probability of the truth be upon one side rather than upon the other.

“I charge you that you are made by law the sole judges of the facts in the case and of the credibility of each and all of the witnesses who have testified before you in the case and of the weight you will give to the testimony of the several witnesses who have appeared before you.

“In determining the credibility of any witness and the weight you will give to his testimony, you have the right to [282] take into consideration his manner and appearance while giving his testimony, his means of knowledge, any interest or motive which he may have, if shown, and the probability or improbability of the truth of his statements when considered in connection with the other evidence and the facts and circumstances of the case. If you believe that any witness has wilfully sworn falsely as to any material fact in the case, you have the right to wholly disregard that witness' testimony, except in so far as his statement may be corroborated by other credible evidence or by the facts and circumstances proven in the case. You should not be influenced by any consideration other than the evidence that is be-



fore you, and the law, as I have presented it to you in these instructions.

“Should you find for the plaintiff, the form of your verdict will be, ‘We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths do find for the plaintiff and assess his damages at the sum of \$21,225,’ being the amount claimed, with interest at the legal rate of 6% on \$10,000 from May 13 and on \$10,000 from June 1st. If you find for the defendant, the form of your verdict will be, ‘We, the jury duly empaneled and sworn in the above-entitled action, upon our oaths do find for the defendants.’ As I have heretofore charged you, should you find for the defendant that means that the defendant is authorized to keep the \$10,000 heretofore paid to it by Mr. Myers as liquidated damages.

“I think I have given all the requests asked by either side and not refused.”

The defendant then and there at the proper time and before the jury retired excepted to parts of said charge, which parts were given at request of plaintiff as follows: [283]

“You are instructed that the burden of proof is upon the Alamo Cattle Company, before they can recover judgment against plaintiff to show that cattle alleged to have been tendered on May 9th and 12th, 1913, fully complied with the contract in every respect.”

Because the burden of proof was on the plaintiff to show a breach of the contract by the defendant.

Defendant further excepted to part of said charge,

which part was given at request of plaintiff as modified as follows:

“You are instructed that if you believe the cattle tendered on or about May 9th or May 12th did not comply with the contract as far as quality, ages and numbers are concerned, the letter from the defendant, dated May 13th, 1913, constituted a breach of the contract on the part of the defendant and justified the plaintiff in treating it as violated by the defendant and at an end.”

Because said charge is incomplete, in that it justifies the plaintiff in treating the contract as at an end without requiring proof on his part that he had performed the conditions of the contract to be by him performed up to the time of the breach of the contract and that he was ready, willing and able to perform the contract on his part.

The defendant further excepted to part of said charge as follows:

“You are instructed that under the terms of the contract sued upon, the obligation was imposed upon the defendant to gather and deliver a train-load of cattle complying in all respects as to grade and quality with the requirements of the contract and plaintiff was under no obligation to examine, inspect or cut from the herd of cattle gathered for delivery by defendant, cattle not up to such requirements. In other words, the plaintiff is not, under the terms of the [284] contract sued upon, required to cut from any herd of cattle gathered, such cattle as there might be in the herd, consisting of runts, stags, cripples, lump-jaws, sway-backs, blinds, cattle too thin

to ship, unmerchantable cattle, cattle under two years old, all cattle not of the grade as good or better than Terrazas cattle.”

Because such charge directs the jury to find that defendant had breached the contract if there were any such defective animals in the herd tendered by it, even if the jury found that there were only one or two or a very small number of the animals described in the herd so tendered, and because even if the jury found that there were a few such defective animals in said herd, the said tender of said herd might nevertheless have been good under the contract and the plaintiff would thereupon be under the duty to designate and cut out such defective cattle in said herd.

The defendant further excepted to part of said charge as follows:

“You are instructed that no duty devolved upon the plaintiff to cut from any cattle gathered by the defendant, runts, stags, cripples, lump-jaws, sway-backs, cattle too thin to ship or unmerchantable cattle, but that under the terms of the contract, the duty devolved upon the defendant of gathering and tendering for delivery to the plaintiff cattle in train-load lots, of full ages, exclusive of cattle of the descriptions above mentioned and in numbers so as to permit of a cut by plaintiff of 15% of clean, contract, merchantable cattle and still leave a train-load lot to be delivered on board cars at Nogales, Arizona.”

Because it authorized the jury to find that the defendant's tender of cattle was not in compliance with the terms of the contract even though the jury found that there were only a few defective cattle in the herd



so tendered by defendant, and authorized [285] the jury to find that the plaintiff was under no obligation to designate or cut out such cattle as it considered defective but could refuse to accept said herd even though there were very few defective cattle in said herd.

The defendant further excepted to part of said charge as follows:

“You are instructed that under the terms of the contract sued upon, the plaintiff was under no obligation to arrange for payment of the cattle to be delivered until and unless the defendant had gathered and offered for delivery in the Republic of Mexico, cattle of the grade and quality required under the terms of the contract and in numbers sufficient to constitute train-load lots, after deducting 15% of contract cattle.”

“You are instructed that no duty devolved upon the plaintiff in the matter of delivery and acceptance of cattle from the defendant under the terms of the contract sued upon, other than to accept such contract cattle in train-load lots, provide care for transportation and pay to the defendant the contract price per head upon delivery of the cattle, free of all the duties and expenses on board cars at Nogales, Arizona. Unless therefore, you find from the evidence and believe that the defendant actually gathered contract cattle in train-load lots, ready for delivery on board cars at Nogales, Arizona, plaintiff was under no obligation to arrange for payment therefor in a manner satisfactory to the First National Bank of Nogales, Arizona.”

“The contract makes the payment of the balance of the purchase price payable when the cattle are delivered on the cars, and I therefore charge you that the ability and readiness of the plaintiff so to pay for the cattle is a condition precedent to the plaintiff’s right of recovery in this [286] action, unless you find that defendant refused to comply with the contract on its part before any breach of the contract by the plaintiff, in which event the plaintiff need not show his readiness and ability to perform the contract.

“Gentlemen, I repeat: The contract makes the payment of the balance of the purchase payable when the cattle are delivered on the cars, and I therefore charge you that the ability and readiness of the plaintiff so to pay for the cattle is a condition precedent to the plaintiff’s right of recovery in this action, unless you find that the defendant, the Alamo Cattle Company, refused to comply with the contract on its part before any breach of the contract by the plaintiff, in which event the plaintiff need not show his readiness and ability to perform the contract.”

“You will observe that the contract provides that the buyer was required to give 15 days’ notice for each delivery of cattle in train-lots during the months of April and May, 1913, furnish the cars at Nogales, Arizona, to receive the cattle and to guarantee payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, before each shipment crossed the line and to make such payment when the cattle were delivered on board cars, but under the facts and tes-

timony in this case, it is shown that the cattle, variously estimated at from one thousand to fourteen hundred head and alleged to have been by the defendant tendered to the plaintiff on or about May 9th or May 12th, 1913, under the contract, were not accepted or received by the plaintiff, and therefore it seems to me that neither the question of whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase [287] price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material issues in this case. I say it seems to me that they are not. The main issue of fact to be presented to you for your consideration being whether or not the cattle tendered on or about May 9th or May 12th, 1913, were in reality as good as or better than Terrazas cattle, in train-load lots and in the numbers of the brands, ages, grades, and quality required under the terms of the contract, whether or not the plaintiff was justified in his refusal to take the cattle. I say it seems to me that those issues are the main issues to be submitted to you, for your determination.

“I think, gentlemen, I will repeat; that under the facts and testimony in this case it is shown that the cattle, variously estimated at from one thousand to fourteen hundred head and alleged to have been tendered by the defendant to the plaintiff on or about May 9th or May 12th, 1913, under the contract, were not accepted or received by the plaintiff and therefore it seems to me that neither the question of



whether the plaintiff was prepared to or did furnish cars, nor was able to or did guarantee the payment of the balance of the purchase price in a manner satisfactory to the First National Bank of Nogales, Arizona, or whether he was able to make such payment when the cattle were delivered on board the cars, are material—material issues in this case. The material issue of fact to be presented to you and submitted to you for your consideration, being whether or not the cattle tendered on or about May 9th or May 12th were in reality as good as or better than Terrazas cattle; whether they were tendered in train-load lots and in the numbers, of the brands, [288] ages, grades and quality required under the terms of the contract—whether or not the plaintiff was justified in his refusal to take the cattle.

“If you find from the evidence in this case that defendant tendered and offered cattle to plaintiff in performance of the contract, which were not as good as or better than Terrazas cattle and that the defendant refused to furnish any other cattle under the contract which were as good as or better than Terrazas cattle at the time and in the manner provided for in the contract, then the defendant broke the contract and the plaintiff is entitled to a verdict, regardless of whether the plaintiff was able to and did furnish cars at Nogales to receive cattle and regardless of the fact, if it be a fact, that payment for any cattle referred to in the contract had not been guaranteed in a manner satisfactory to the First National Bank of Nogales, Arizona. On the other hand, if you find that the defendant tendered and offered to the plain-

tiff the cattle called for in the contract, in the quantity and of the ages specified, and that such cattle were as good as or better than Terrazas cattle, then your verdict must be for the defendant.”

“Therefore, it seems to me, as I said before, but will now repeat and explain, that if there was a breach, if either party breached the contract on or about May 9th or May 12th, 1913, then it is not material to inquire whether or not the defendant the Alamo Cattle Company loaded the cattle on cars at Nogales, nor is it material to inquire whether or not the plaintiff had made financial arrangements satisfactory to the Bank at Nogales or had made satisfactory arrangements to have on hand cars to receive these cattle. In other words, it seems to me that they had not reached those points,—they had [289] gotten to the point where the contract was breached by one party or the other before the time arrived for the plaintiff to make these financial arrangements or these arrangements for cars or for the defendant to deliver the cattle on board the cars at Nogales Station, Arizona. In other words, it was the duty of the defendant upon receipt of 15 days’ notice of each delivery in train-load lots during the month of April and up to and including May 12th, 1913, to gather and deliver f. o. b. cars at Nogales Station, all duties and expenses paid, the cattle called for under the terms of the contract, and if the defendant did, on or about May 9th or 12th, 1913, tender and offer to plaintiff a train-load lot of the said cattle, in the numbers and of the ages, brands, grades and quality required under the terms of the contract and if the



plaintiff declined or refused to receive same, then it is not necessary in this case that the defendant should go further and show that the cattle were delivered f. o. b. cars at Nogales Station, all duties and expenses paid.

“On the other hand, if you believe from the testimony that the cattle so tendered by the defendant to the plaintiff at the time above mentioned, were not in the numbers, of the ages, brands, grades and quality required by the terms of the contract, then the plaintiff was under no obligation as to that particular lot of cattle, to receive same or furnish cars therefor, or to guarantee payment therefor in a manner satisfactory to the First National Bank of Nogales.”

On the ground that such instructions withdraw from the consideration of the jury, the question of whether the plaintiff was in reality willing and able to perform the contract upon his part prior to any breach of the contract upon the part of the defendant, which question is a question of fact for the jury to decide. [290]

And upon return of the verdict the Court gave the defendant 30 days within which to prepare and file its bill of exceptions to the rulings of the Court made at the trial of this case, and thereafter by order entered June 27, 1914, the Court gave the defendant until July 15, 1914, within which to file its bill of exceptions.

### **Recital Re Exhibits.**

The exhibits in this action, of which the following is a list, will be printed in the record on appeal in



354 *Alamo Cattle Company, Sociedad Anonima,*

accordance with the stipulation of counsel of the parties herein.

Original contract, Plaintiff's Exhibit "A."

Plaintiff's "B," Assignment of Contract.

Plaintiff's "C," Letter, defendant to plaintiff dated April 25.

Plaintiff's "D," Letter, Oliver to Kibbey, dated April 28.

Plaintiff's "E," Letter, Oliver to defendant, dated May 3.

Plaintiff's "F," Telegram, defendant to Oliver, dated May 3d.

Plaintiff's "G," Telegram, Oliver to defendant, dated May 4th.

Plaintiff's "H," Telegram, Oliver to defendant, dated May 5th.

Plaintiff's "I," Telegram, defendant to Oliver, dated May 7th.

Plaintiff's "J," Telegram, Oliver to defendant, dated May 8th.

Plaintiff's "K," Letter, defendant to plaintiff, dated May 13th.

Plaintiff's "L," Telegram, plaintiff to defendant, dated May 14th.

Plaintiff's "N," Telegram, Myers to Hall, dated May 11th.

Plaintiff's "O," Telegram, plaintiff to defendant, dated May 11th.

Plaintiff's "P," Contract between Hall and Clay-Robinson & Co.

Defendant's 1. Telegram, Oliver to S. P. Agent, dated May 9.

- Defendant's 2. Letter, Hall, by Dickson, to S. R.  
May 24th.
- Defendant's 3. Letter, Oliver to S. P., April 28th.
- Defendant's 4. Letter, Hall per Dickson, to S. P.,  
May 5th.
- Defendant's 5. Letter, Oliver to Hall, dated Feb.  
4th.
- Defendant's 6. Letter, Oliver to Defendant, Apr.  
21st.
- Defendant's 7. Telegram, Oliver to Kibbey, May  
9th.
- Defendant's 8. Telegram, defendant to Oliver, May  
13th.

**[Order Approving, Settling and Allowing Bill of  
Exceptions.]**

The defendant having served its proposed bill of exceptions upon the plaintiff and the plaintiff having served the proposed amendments and corrections thereto upon the defendant, and the defendant having excepted and allowed said amendments and corrections, and the bill of exceptions being amended and corrected accordingly and duly filed and served herein, and the counsel for the respective parties have stipulated in open court that said bill of exceptions is correct, it is hereby certified that said corrected and amended bill of exceptions is a full, complete and correct abstract of all the testimony introduced by the parties on the hearing of the cause, constitutes all the substantial testimony therein material to the issue, and it is

ORDERED that said bill of exceptions be and it

356 *Alamo Cattle Company, Sociedad Anonima*,  
hereby is approved, settled and allowed this 1st day  
of July, A. D. 1914, in term.

WM. H. SAWTELLE,  
Judge.

[Endorsements] : No. 10 (Tucson). In the  
United States District Court for the District of  
Arizona. John G. Hall, Plaintiff, vs. Alamo Cattle  
Company, Sociedad Anonima, Defendant. Bill of  
Exceptions and Order Allowing Same. Filed July  
3, A. D. 1914. George W. Lewis, Clerk. By Effie  
D. Botts, Deputy Clerk. [291]

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*In the District Court of the United States in and  
for the District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

**Praeipie for Transcript of Record.**

To the Clerk of the United States District Court for  
the State of Arizona.

You will please prepare a transcript of the com-  
plete record in the above-entitled cause to be filed in  
the office of the Clerk of the United States Circuit  
Court of Appeals for the Ninth Judicial Circuit  
under the Writ of Error to be perfected to said court  
in said cause, and include in said transcript the fol-  
lowing proceedings, pleadings, papers, records, and  
files, to wit:



Judgment-roll, except Answer but Including Amended Answer;

Transcript of Minute Entries;

Order Allowing Bill of Exceptions;

Bill of Exceptions;

Motion for New Trial;

Order Refusing a New Trial;

Petition for Writ of Error;

Assignment of Errors;

Order Allowing Writ of Error;

Bond on Writ of Error;

Writ of Error;

Citation; [292]

Praeceptum for Transcript;

Plaintiff's Exhibits, "C," "D," "E," "F,"  
"G," "H," "I," "J," "K," "L," "N," "O,"  
"P."

Defendant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8,—

and all other records, entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said writ of error in said cause, said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

FRANK J. BARRY,

WILLIAM M. SEABURY,

Attorneys for Defendant.

[Endorsements]: No. 10 (Tucson). In the District Court of the United States in and for the District of Arizona. John G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defend-

358 *Alamo Cattle Company, Sociedad Anonima*,  
ant. Praeipie for Transcript of Record. Filed  
July 7, 1914. George W. Lewis, Clerk. By Effie D.  
Botts, Deputy Clerk. [293]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the United States District Court for the District  
of Arizona.*

No. 10 (TUCSON).

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

United States of America,  
District of Arizona.—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, number 1 to 193, inclusive, constitute and are a true, complete and correct copy of the record, pleadings, and proceedings had in the case of John G. Hall, Plaintiff, vs. The Alamo Cattle Company, Sociedad Anonima, Defendant, No. 10 (Tucson), as the same remain on file and of record in said District Court, and I also annex and transmit the original Writ of Error, and Citation, in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of \$183.00 and that the same has been paid in full by the appellant, The Alamo Cattle Company, Sociedad Anonima.

[Seal]                      GEORGE W. LEWIS,  
Clerk United States District Court, District of  
Arizona.

*In the District Court of the United States for the  
District of Arizona.*

Plaintiff,

VS.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

**Writ of Error [Original].**

The President of the United States to the Honorable  
Judge of the United States District Court for  
the District of Arizona, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between John G. Hall, plaintiff, and the Alamo Cattle Company, Sociedad Anonima, defendant, a manifest error has happened, to the great damage of the said Alamo Cattle Company, Sociedad Anonima, defendant, as



by its complaint appears, *we willing* that error, if any hath, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at San Francisco, California, in said Circuit, within thirty days of the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, shall be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this the 24th day of June, A. D. 1914, and of the Independence of the United States the one hundred and thirty-sixth.

Allowed:

WM. H. SAWTELLE,

U. S. District Judge.

[Seal] Attest:

GEORGE W. LEWIS,

Clerk of the United States District Court for the District of Arizona.

By Effie D. Botts,  
Deputy Clerk.

[Endorsed]: No. 10 (Tucson). In the District Court of the United States for the District of Arizona. John G. Hall, Plaintiff, vs. Alamo Cattle

Company, Sociedad Anonima, Defendant. Writ of Error. Filed June 24, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy.

No. 2451. United States Circuit Court of Appeals for the Ninth Circuit. Original Writ of Error. Received Jul. 18, 1914. F. D. Monckton, Clerk. Filed Jul. 27, 1914. F. D. Monckton, Clerk.

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**[Citation on Writ of Error (Original).]**

*In the District Court of the United States for the  
District of Arizona.*

JOHN G. HALL,

Plaintiff,

vs.

ALAMO CATTLE COMPANY, Sociedad Anonima,  
Defendant.

The President of the United States to John G. Hall  
and to Stoneman & Ling, and Loomis and Knol-  
lenberg, Your Attorneys, Greeting:

You are hereby cited and admonished to be and  
appear at a session of the United States Circuit Court  
of Appeals for the Ninth Circuit, to be holden at the  
City of San Francisco, California, in said circuit,  
within thirty (30) days from the date of this writ,  
pursuant to a writ of error filed in the clerk's office  
of the District Court of the United States for the  
District of Arizona, wherein the Alamo Cattle Com-  
pany, Sociedad Anonima, is plaintiff in error, and  
you are defendant in error, to show cause, if any  
there be, why the judgment in said writ of error  
mentioned should not be corrected, and why speedy

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justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE,  
Chief Justice of the Supreme Court, this the 24 day  
of June, 1914, and of the Independence of the United  
States the one hundred and thirty-sixth.

WM. H. SAWTELLE,  
United States District Judge for the District of Arizona.

[Endorsed]: In the District Court of the United States for the District of Arizona. John G. Hall, Plaintiff, vs. Alamo Cattle Company, Sociedad Anonima, Defendant. Citation. Service of a copy of the within citation is hereby admitted. June 24, 1914. Stoneman & Ling and Loomis & Knollenberg, Attorneys of Plaintiff. Filed June 24, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy.

No. 2451. United States Circuit Court of Appeals for the Ninth Circuit. Original Citation on Writ of Error. Received Jul. 18, 1914. F. D. Monckton, Clerk. Filed Jul. 27, 1914. F. D. Monckton, Clerk.



[Endorsed]: No. 2451. United States Circuit Court of Appeals for the Ninth Circuit. Alamo Cattle Company, Sociedad Anonima, a Corporation, Plaintiff in Error, vs. John G. Hall, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Received July 18, 1914.

F. D. MONCKTON,  
Clerk.

Filed July 27, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

